S. Hrg. 102–132

CABLE TV CONSUMER PROTECTION ACT OF 1991

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

S. 12

TO AMEND TITLE VI OF THE COMMUNICATIONS ACT OF 1934 TO ENSURE CARRIAGE ON CABLE TELEVISION OF LOCAL NEWS AND OTHER PROGRAMMING AND TO RESTORE THE RIGHT OF LOCAL REGULATORY AUTHORITIES TO REGULATE CABLE TELEVISION RATES, AND FOR OTHER PURPOSES

MARCH 14, 1991

Printed for the use of the Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE
43-362 WASHINGTON : 1991

S261-56

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-035385-8

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CABLE TV CONSUMER PROTECTION ACT OF 1991

THURSDAY, MARCH 14, 1991

U. S. SENATE,
SUBCOMMITTEE ON COMMUNICATIONS,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:01 p.m., in room SR-253, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Toni Cook and John Windhausen staff counsels; and Gina Keeney, minority staff counsel.

OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. We are here this afternoon to consider S. 12, the Cable Television Consumer Protection Act of 1991. This bill was introduced by Senator Danforth with seven co-sponsors. For the past several years, there has been much concern about the 1984 cable act, the extent of the cable industry's market power, and the high rates being paid by subscribers. This legislation was introduced in response to those concerns. While all of us would prefer competition to regulation, the fact is that the multichannel video marketplace is not competitive and it is not expected to be in the very near future. S. 12 represents an effort to promote competition and to provide reasonable regulation until that competition develops.

Specifically, S. 12 gives the FCC the authority to regulate rates, set technical standards and customer service standards. At the same time the bill encourages competition by increasing competitors' access to programming, by amending the leased access provisions and by including must-carry provisions. In addition, the legislation provides for some structural regulations aimed at addressing cable's market power.

This legislation is the result of two years of work and over 11 days of hearings by this Committee. Many of the provisions in this bill represent hundreds of hours of meetings and negotiations by members and their staff with all of the interested parties, including the cable industry. Despite these efforts, there was one outstanding issue that was not resolved last year — access to programming. Had we had more time last year, I believe that this cable bill would have passed the full Senate. In this Congress, we have plenty of time.

It is unfortunate that the cable industry has now taken the position that there is no need for this or any other legislation. There is no doubt that since deregulation, the cable industry has flourished and subscribers now have many new program options. The majority of cable operators provide good service at reasonable rates. This legislation before us today is not intended to stifle the cable industry. Rather, it is intended to give the FCC the ability to control those cable operators that have come to be known as "bad actors," and to put in place some mechanisms to promote competition. We are here today to consider whether S. 12 does in fact achieve those goals. I look forward to hearing the views of all our witnesses here today.

Before I list the witnesses we will hear from today, I would like to note for the record that Charles Hewitt, President, of the Satellite Broadcasting and Communications Association, was scheduled to testify today, but will not be able to appear. His testimony will be included in the record. We will also be including in the record a statement from Alfred Sikes, the Chairman of the FCC, who also was not able to appear today.

The first witness will be the Honorable Senator Joseph Lieberman. He will be followed by a panel consisting of two mayors: Sharpe James, of Newark, New Jersey, representing the National League of Cites and the U.S. Conference of Mayors; and David Adkisson, of Owensboro, KY.

The second panel will consist of representatives of the cable industry: James Mooney, President, National Cable Television Association; Ted Turner, President and Chairman, Turner Broadcasting Systems, Inc.; and James Kennedy, Chairman and CEO, Cox Enterprises, Inc.

We will then hear from Edward Fritts, President, National Association of Broadcasters and James Hedlund, President, Independent Television Association.

The next panel will include: Gene Kimmelman, Legislative Director, Consumer Federation of America; D.J. Everett, President, Community Broadcasters Association; and John Sodolski, President, United States Telephone Association.

The final panel will consist of: Robert Schmidt, President, Wireless Cable Association; and Robert Phillips, CEO, National Rural Telecommunications Cooperative.

I welcome all of you and look forward to hearing your testimony.

There will be unusual circumstances this day—in a few minutes we will begin the mark-up of the Operation Desert Shield/Desert Storm supplemental—and there will be votes on the floor throughout the day.

Before we proceed, Senator Ford, do you have any statement?

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Mr. Chairman, you put me in an untenable position, but since I have been in untenable positions before I shall make my statement.

Mr. Chairman, I am delighted to join you today in the review of the Cable Television Consumer Protection Act of 1991. I want to commend you for holding these hearings and all the work you have done during the last Congress on this particular subject. I am pleased that S. 12 is a bipartisan approach to a problem that needs, in my opinion, immediate attention.

All of my State offices send me a telephone log weekly so that I can keep up with the views of constituents. Not a week goes by that those logs are not covered with cable television complaints. No other issue has generated more mail since January than cable television rates. You can take a look at my mail bags and easily conclude that every cable system in the State has raised their rates since the first of the year.

I am very pleased that the mayor of my hometown, David Adkisson, will be appearing before the committee today. I want to thank the Chairman, Senator Inouye, for including Dave on the witness list. I believe Dave can outline the experiences of a mid-size city as most times we hear from large urban areas.

There really is a difference, Mr. Chairman, in service and quality of programming offered. I suggested at a breakfast of Kentucky mayors on Tuesday of this week that they might want to catch Dave's appearance on C- SPAN. Most of them indicated they did not get C-SPAN.

Many areas of Kentucky do not even have a local cable person to whom they can direct their problems. The City of Shelbyville, a community near Louisville, KY with a growing population, went for over 2 years having to call an 800 number for service, as there was no cable representative in the community. Unfortunately, many communities in Kentucky share this problem. There are a number of communities considering establishing their own city-owned systems, which has already been done in Glasgow, KY. Of course, that alternative has already invited lawsuits.

In Northern Kentucky, the local leaders attracted another cable system to compete with the original system, which started a round of lawsuits yet to be settled. It appears that the result of this 2-year battle is that the original cable company is purchasing its competitor. Now that is real competition.

I could go on and on with the examples of cable problems in Kentucky, Mr. Chairman. Yes, there are some good systems that are interested in the community and provide a good service at a reasonable rate. Unfortunately, those systems are few in my State. I am amazed at the number of individuals in meetings on entirely different subjects who raise the cable issues. In my opinion, Mr. Chairman, now is the time to act.

I do not believe that the answer is to wait for the FCC to act. These problems have been growing since the 1984 Act, and the FCC has ignored the situation. Many of the provisions of S. 12 could have been easily addressed by the FCC. I must admit I do not have a lot of confidence in the FCC proceeding.

Today the committee will also hear from D. J. Everett, the lower power television station manager in Hopkinsville, KY. D.J. is president of the trade association for low power stations and in my opinion and in the opinion of many others is one of the most creative managers in the country. Hopkinsville is fortunate to have a station so committed to local programming.

So Mr. Chairman, I look forward to the testimony from the witnesses this afternoon and again thank you for including representatives from my State as witnesses.

Senator INOUYE. Thank you very much.

Now I am pleased to recognize a co-author of this measure, S. 12, the Chairman of the Committee, Senator Hollings.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. I have followed the communications industry for decades and am continually impressed by its progress and achievements. Who would have a thought a decade ago that over half of the American public would be willing to pay to watch television? After all, we had the best television in the world, and you could receive it for free. Yet, it is now clear that the public sees something special in cable television—over 57 percent of American homes now subscribes to cable—and people are willing to pay to receive it.

This tremendous growth in the cable industry has produced much of value. Most cable subscribers have access to 36 channels, and this amount is steadily increasing. Many systems already offer twice as many channels. This increase in capacity has been accompanied by a great increase in the programming that is offered, and here too, more is on the horizon.

This growth also has produced problems. The Committee has heard about unreasonable rate increases, customer service problems, and various anticompetitive market practices. I know that many of these problems are the result of certain "bad actors." Unfortunately, these bad actors keep popping up. Recently, I learned of a situation involving two communities, next door to one another, where the citizens of the two communities are paying vastly different rates for essentially the same service. Everyone is frustrated, but there is nothing that the local authorities can do once the franchises are awarded. It is clear that we need to ensure that these situations can be dealt with.

The cable industry is no longer a second class video distributor that only retransmits broadcast programming. It now serves more than half of American homes, and that amount is increasing. Furthermore, it has de facto exclusive franchises. It appears well on its way to becoming the dominant video distributor with the power to engage in anticompetitive practices.

I know that cable systems face some competition from other video providers. However, most often there exists no multichannel competitor, and most people subscribe to cable because of the wide group of satellite- delivered signals. Cable systems thus have become important gatekeepers. They are to be commended for their growth, but they also must recognize that they have achieved a new status and have acquired new responsibilities with respect to the consumer and the provision of video services.

I have had many discussions with my colleagues about problems in the cable industry. We need some control over rates where competition does not exist. We need to ensure customers are properly served. We need to prevent monopolistic practices. At the same time, we should encourage the growth of programming, the increase in channel capacity, and the development of new technologies.

I believe that S. 12 seeks to balance these competing objectives. It represents a substantial effort, and I look forward to working with my colleagues and with the interested parties in moving forward on this bill.

Mr. Chairman, let me thank you and our colleagues for once again addressing this important issue. I say once again. I think this really started about 4 years ago when our distinguished colleagues from Tennessee, Senators Gore and Bumpers, had the dish bill trying to get programs for individuals who had satellite dishes. Then it came back due to lack of services and outrageous rate increases of the cable operators. Cutting it short, we had 11 days of hearings on cable issues in the last Congress, and now the strategy is the FCC. They have a new flavor.

There is an old political adage: When in doubt do nothing and stay in doubt all the time. That reelects a lot of people.

I do think, as Senator Ford has said, the time has now come to act. With respect to the FCC I am dismayed, I say publicly, over its recent delay of a ruling with respect to financial interest and syndication rules. What happened is that we said now that we have an FCC we have confidence in, we will leave the FCC alone. I know of none in this Committee who have addressed the FCC on that score. I have refused to write or call or do anything else on the so-called FIN/SYN proceeding.

They initiated the FIN/SYN proceeding in March of last year. This has been a 10-year argument. The Justice Department filed their comments in June, a big, thick group of comments. The FCC issued a second notice setting forth the facets, variations, and segments of an overall ruling in October again of last year. Now, however, they are about to reach a conclusion, I know not which.

But, then comes the political maneuver by the Assistant Attorney General asking that they postpone the ruling and accept more comments just like they are now trying to juggle you and me around. That is exactly what is going on here. That is the frustration. People say they have no confidence in the Government because the Government just fiddles.

I think now is the time to act, I hope we will not have to have 14 hearings. We can take the records from those last sessions and everything else. Not too much has changed. Our colleagues are well informed. We have heard from all sides, and there is no reason to go through months upon months of delay. Not that I am in a rush, but the House did pass a bill last year, and we could not even get one passed. So I think we ought to make a very strong effort to not only report the bill but enact one at least on the Senate side. Senator Inouye we appreciate your leadership on this score.

By the way, we do have a 2:30 p.m. markup of a supplemental in Appropriations to which we will have to go.

Senator INOUYE. Thank you very much. Senator Gore.

OPENING STATEMENT BY SENATOR GORE

Senator GORE. Mr. Chairman, thank you so much. I will put my full statement in the record. With your indulgence I would like to say a few words here.

I am very pleased and grateful to you, Mr. Chairman, that the committee is moving rapidly on the consideration of S. 12. As in the last Congress, I am very pleased to be an original sponsor with Senator Hollings, the Chairman of the full committee, and with you and Senator Danforth.

It would have been a great relief to this committee to be able to say that in the 4 years to which Senator Hollings referred, in the days since we considered cable legislation last fall even, that the marketplace has solved the problems that were so obvious then. It would be a relief to say that the FCC had acted decisively on this front.

After having been in the trenches of these fights for really 9 years now with some of the worst cable abuses of all occurring in my home State of Tennessee, no one would have been more pleased than I to be able to declare that this debate was concluded and to move on to other issues of importance to this committee.

Unfortunately, however, very little in the marketplace has changed, and the painfully weak FCC response has done little more than confuse local officials and consumers who cry out for tools to correct the kind of cable behavior that brought this issue to a head in the first place. The problem is not only rate regulation or competitive access to programming. We have recently noted a dramatic increase in the cable siphoning of television programs previously available to anyone over free TV.

Mr. Chairman, when I noted last year that some in this industry boasted that Super Bowl would soon be on pay-per-view television, the prediction was widely dismissed as a political impossibility. Yet, just 2 weeks ago, the National Football League has announced a pay-per-view plan for the 1992 or 1993 season.

Baseball games have been pulled off free TV en masse. In my State, many University of Tennessee football games, previously licensed to free TV broadcasters, are now available over pay-per-view only.

Last week, the tens of thousands of Memphis State basketball fans were told to forget about watching their team in the conference championship unless they had cable.

What is happening is not complicated. The most aggressive cable operators, TCI and others, are extracting huge profits from their captive basic customers and using those funds to bid up the prices for programming that has always been free to the public.

Mr. Chairman, I am painfully aware there is no easy solution for this sports siphoning issue. The sports leagues want the cash to pad their profits and pay huge players salaries. The colleges want the money to enhance their sports programs. Mr. Chairman, who loses? The public loses, that is who. I believe it is the responsibility of the Congress and this committee to examine this practice. I hope we can do so in the near future. It is not only the sports fan who is put in jeopardy but the future of free television itself in the system of mass communication as we know it.

I was among those who worked last year to achieve a last minute compromise on this bill as the Congress came to a close in the last session. Some cable executives saw the wisdom in bringing this debate to an end and worked with us constructively to fashion a reasonable bill to send on to the White House.

It soon became clear that the administration was opposed to even a modest reregulatory cable bill and used their friends in the Senate to protect the President and prevent the spectacle of a veto of important pro-consumer legislation. Perhaps when S. 12 is presented to the White House this year or in 1992, this President will think better of a veto threat and finally give consumers a fair shake.

Since the cable bill got torpedoed during floor action last October, we have seen no let-up in the industry's efforts to stall competing technologies like satellite dishes, wireless operations or start-up direct broadcast satellite services. We will hear testimony today, for example, from the National Rural Telecommunications Co-op that 3 years after beginning this service many programs are still denying them access at rates and terms competitive with local cable systems.

We already knew that the rates were dramatically outstripping the Consumer Price Index, but prices rose another 13.1 percent in 1990 alone. Now we are learning about all kinds of new schemes, clever back-door rate increases, decoder rental charges, outrageous one-time charges to change service to less expensive packages and the like.

So little has changed, Mr. Chairman. I am optimistic that this year those tactics will not work, that the Senate will have a chance to go on record on this important consumer issue.

In closing, when you have an industry that looks like a monopoly, acts like a monopoly, smells like a monopoly, and charges captive customers like a monopoly, it is clearly time to act.

Mr. Chairman, I will refer in the record to the efforts that Senator Burns and I have been making on the telco legislation, but in closing thank you very much for holding this year.

Senator INOUYE. This is not one of our better days. We have a vote in progress. This committee will stand in recess for 10 minutes.

[Recess.]

OPENING STATEMENT BY SENATOR EXON

Senator EXON (presiding). The Committee will please come to order.

Senator Inouye has advised me that he has been unavoidably detained at the Appropriations Committee and asked me to please proceed with the hearing. I understand that there may be some opening statements by some of the other Senators. Just let me start out by saying that I want to congratulate chairman Inouye for holding this hearing, which is a continuation of some of the hearings we had of a very, very similar nature during the last session of Congress.

Speaking only for myself, I am very much interested in hearing the testimony, reviewing the legislation that has already been introduced, and trying to make a determination as to how best to solve a problem that we have. I have been telling all of those who have talked to me about this proposition that it is clear that some action is going to be taken in this session of the Congress, and I think such action should be taken or, at a minimum, some clear arrangement or understanding with the regulatory authorities in the Federal Government that they can or should do something.

That is why I believe that this is a tremendously important hearing on a subject that is of vital interest to people all over this great land of ours. At the present time, I intend to keep as open a mind as possible on this and ask some questions later on that may hopefully get to some of the concerns that I have. I am very pleased to see that we have a broad range of interests represented here today.

I have an opening statement from Senator Gorton that he would like to have included in the record.

[The statement and bill follows:]

OPENING STATEMENT BY SENATOR GORTON

Mr. Chairman: As a cosponsor of S. 12, the Cable Television Consumer Protection Act, I am pleased that the Commerce Committee has scheduled this hearing so early in the new Congress. This committee overwhelmingly supported a similar bill in the last Congress and I was disappointed that the Senate did not consider the measure before adjournment last year. Because of this early start in the 102nd Congress, I am confident that this bill will not meet a similar fate as its predecessor.

My primary interest in enacting new cable legislation is to spur competition. In virtually every community, the local cable company operates without either the competitive check of another multichannel provider or effective local regulation. Citizens are left with little choice. They can either subscribe to cable at whatever terms, conditions and services their local company happens to offer or they can go without. Basic prices and additional charges for cable services vary from one area to the next. While consumers in one community may be relatively happy with the prices and services provided by their local cable company, the next city's residents may suffer at the hands of an unresponsive company that provides poor service at high prices. The consumer, I am convinced, is best served when he or she has alternatives from a second cable operator, a microwave or satellite distributer or potentially, from a local telco provider.

The bill before the committee today will allow for rate reregulation of the basic tier and equipment used to provide the service in the absence of competition from both a sufficient number of broadcast stations and from another multichannel video provider. In order to discourage cable companies from shifting many of their most desirable programs to another tier or category of service, the bill provides that the rates may also be regulated for the lowest price tier of service to which at least 30 percent of the system's customers subscribe.

In order to enhance competition, vertically integrated national programmers are barred from unreasonably refusing to deal with distributors. They are also barred from discriminating in price and terms. Furthermore, a cable operator cannot require a financial interest in programming as a condition of carrying that programming. This is a vital section of the bill because the ability to obtain programming at a fair rate is often the single largest hurdle a multichannel provider must overcome in order to have a chance to compete in the marketplace.

While I am a cosponsor of this measure, I am not 100 percent comfortable with each and every provision contained within it. will be interested in hearing the reactions and recommendations of the witnesses before the committee today. The American television viewer has benefitted greatly from the development of a wide variety of television programming, much of which is offered only on cable. We must be careful not to reregulate this industry to such an extent that the development of new programming will cease. On the other hand, the consumer deserves protection in instances where choice is not available. I hope that before we are done, this legislation will contain additional provisions to foster competition and to give television viewers a greater number of options in the future.

102D CONGRESS
1ST SESSION

S. 12

To amend title VI of the Communications Act of 1934 to ensure carriage on cable television of local news and other programming and to restore the right of local regulatory authorities to regulate cable television rates, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 14 (legislative day, JANUARY 3), 1991

Mr. DANFORTH (for himself, Mr. INOUYE, Mr. HOLLINGS, Mr. GORE, Mr. LIEBERMAN, and Mr. METZENBAUM) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To amend title VI of the Communications Act of 1934 to ensure carriage on cable television of local news and other programming and to restore the right of local regulatory authorities to regulate cable television rates, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Cable Television Consumer Protection Act of 1991".

FINDINGS

SEC. 2. The Congress finds and declares the following:

(1) Pursuant to the Cable Communications Policy Act of 1984, rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986. Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost three times as much as the Consumer Price Index since rate deregulation.

(2) For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without a sufficient number of local television broadcast signals and without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable opera-

tor as compared to that of consumers and video programmers.

(3) There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.

(4) There has been a substantial increase in the penetration of cable television systems over the past decade, with cable television services now available to 71.3 million of the 92.1 million households with televisions. Nearly 54 million households, over 58 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium.

(5) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

(6) Cable television rates for video programming provided on other than the basic service tier should not be governmentally regulated except in extraordinary circumstances, which may include the need to control undue market power.

(7) The cable television industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for non-cable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over non-affiliated cable operators and programming distributors using other technologies.

(8) There is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations which Congress has authorized, as expressed in section 396(a)(5) of the Communications Act of 1934 (47 U.S.C. 396(a)(5)). The distribution of unique noncommercial, educational programming services, including those transmitted by noncommercial educational television stations serving local communities or markets, advances that interest in providing for the further education of our citizens and encouraging "public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an

expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation".

(9) The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems because—

(A) public television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens;

(B) public television is a local community institution, supported through local tax dollars and voluntary citizen contributions in excess of $10,800,000,0000 since 1972, that provides public service programming that is responsive to the needs and interests of the local community;

(C) the Federal Government, in recognition of public television's integral role in serving the education and informational needs of local communities, has invested more than $3,000,000,000 in public broadcasting since 1969; and

(D) absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.

(10) A primary objective and benefit of our Nation's system of regulation of television and radio broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

(11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

(12) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

(14) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately

more advertising revenues will be reallocated from broadcast to cable television systems.

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(16) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

(17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television

systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services.

(18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

(19) The compulsory license was created by Congress as part of a delicate balance between cable television systems and broadcast television stations that included mandatory carriage obligations for cable systems. Cable systems are able to procure programming through the compulsory license at a cost substantially below the cost paid by the broadcast television stations. Cable systems, however, may rely upon the compulsory license as an alternative to negotiating for such programming in the marketplace, but are no longer subject to mandatory carriage obligations. This has created a competitive imbalance between the two industries.

(20) The Cable Communications Policy Act of 1984, in its amendments to the Communications Act of 1934, limited the regulatory authority of franchising authorities over cable operators. Franchising authorities are finding it difficult under the current regulatory scheme to deny renewals to cable systems that are not adequately serving cable subscribers.

(21) Given the lack of clear guidelines in applying the first amendment to cable franchise decisions, cities are unreasonably exposed to liability for monetary damages under the Civil Rights Acts.

(22) Cable systems should be encouraged to carry low power television stations licensed to the communities served by those systems where the low power station creates and broadcasts, as a substantial part of its programming day, local programming.

STATEMENT OF POLICY

SEC. 3. It is the policy of the Congress in this Act to—

(1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media;

(2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;

(3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;

(4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected in receipt of cable service; and

(5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.

DEFINITIONS

SEC. 4. (a) Section 602 of the Communications Act of 1934 (47 U.S.C. 522) is amended by redesignating paragraph (1) as paragraph (2), by redesignating paragraphs (2) and (3) as paragraphs (4) and (5), respectively, by redesignating paragraphs (4) through (10) as paragraphs (7) through (13), respectively, by redesignating paragraphs (11) and (12) as paragraphs (16) and (17), respectively, by redesignating paragraph (13) as paragraph (19), by redesignating paragraphs (14) and (15) as paragraphs (22) and (23), respectively, and by redesignating paragraph (16) as paragraph (26).

(b) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by this section, is further amended by inserting immediately before paragraph (2), as so redesignated, the following new paragraph:

"(1) the term 'activated channels' means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;".

(c) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by this section, is further amended by inserting immediately after paragraph (2), as so redesignated, the following new paragraph:

"(3) the term 'available to a household' or 'available to a home' when used in reference to a multichannel video programming distributor means a particular household which is a subscriber or customer by a multichannel video programming distributor;".

(d) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by this section, is further amended by inserting immediately after paragraph (5), as so redesignated, the following new paragraph:

"(6) the term 'cable community' means the households in the geographic area in which a cable system provides cable service;".

(e) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by this section, is further amended by inserting immediately after paragraph (13), as so redesignated, the following new paragraph:

"(14) the term 'headend' means the location of any equipment of a cable system used to process the signals of television broadcast stations for redistribution to subscribers;

"(15) the term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;".

(f) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by this section, is further amended by inserting immediately after paragraph (17), as so redesignated, the following new paragraph:

"(18) the term 'principal headend' means—

"(A) the headend, in the case of a cable system with a single headend, or

"(B) in the case of a cable system with more than one headend, the headend designated by the participating operator as the principal headend, except that such designation shall not undermine or evade the requirements of section 614;".

(g) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by this section, is further amended by inserting immediately after paragraph (19), as so redesignated, the following new paragraphs:

"(20) the term 'qualified local commercial broadcast station' means any television broadcast station licensed and operating on a channel regularly assigned to its community by the Commission (except where such station would be considered a distant signal under section 111 of title 17, United States Code) that, with respect to a particular cable system—

"(A) is licensed to a community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations, or any successor regulations thereto, is within 50 miles of the principal headend of the cable system, and which delivers to the cable system principal headend either a signal level of −45 dBm for UHF signals and −49 dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal, and

"(B) which is not a qualified noncommercial educational television station and is determined by the Commission to be a commercial station; such term shall not include low power television stations, television translator stations, and other passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

"(21) the term 'qualified noncommercial educational television station' means any television broadcast station which—

"(A)(i) under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; or

(ii) is owned or operated by a municipality and transmits only noncommercial programs for educational purposes; and

"(B) has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in section 396(k)(6)(B) (47 U.S.C. 396(k)(6)(B));

such term includes (I) the translator of any noncommercial education television station with five watts or higher power serving the cable community, (II) a full service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations;".

(h) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by this section, is further amended—

(1) by striking "and" at the end of paragraph (23), as so redesignated; and

(2) by inserting immediately after such paragraph (23) the following new paragraphs:

"(24) the term 'usable activated channels' means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission;

"(25) the term 'video programmer' means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale; and".

REGULATION OF CABLE RATES

SEC. 5. Section 623 of the Communications Act of 1934 (47 U.S.C. 543) is amended to read as follows:

"REGULATION OF RATES

"SEC. 623. (a) Any Federal agency, State, or franchising authority may not regulate the rates for the provision of cable service, or for the installation or rental of equipment used for the receipt of cable service, except to the extent provided under this section and section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

"(b)(1) If the Commission finds that a cable system is not subject to effective competition, the Commission shall ensure that the rates for the provision of basic cable service, including for the installation or rental of equipment used for the receipt of basic cable service, or charges for changes in service tiers, are reasonable; except that if fewer than 30 percent of all customers to that cable system subscribe only to basic cable service, the Commission also shall ensure that rates are reasonable for the lowest-priced tier of service subscribed to by at least 30 percent of the cable system's customers.

"(2)(A) Upon written request by franchising authority, the Commission shall review the State and local laws and regulations governing the regulation of rates of cable systems under the jurisdiction of such franchising authority. The Commission shall authorize such franchising authority to carry out such regulation pursuant to paragraph (1) in lieu of the Commission if the Commission finds that—

"(i) such State and local laws and regulations conform to the procedures, standards, requirements, and guidelines prescribed under paragraph (4) and any interpretative rulings, decisions, and orders of the Commission that relate to rate regulation under this subsection; and

"(ii) such franchising authority will provide the level of protection to consumers required by the Commission and that carries out the national policy established in this title.

"(B) Upon petition by a cable operator or other interested party, the Commission shall review such regulation of cable system rates by a franchising authority authorized under this paragraph. If the Commission finds that the franchising authority has acted inconsistently with the requirements in subparagraph (A), the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with subparagraph (A) (i) or (ii), the Commission shall revoke such authorization.

"(3) A cable operator may add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals. Any obligation imposed by operation of law inconsistent with this subsection is preempted and may not be enforced.

"(4) Within 120 days after the date of enactment of the Cable Television Consumer Protection Act of 1991, the Commission shall prescribe by rule procedures, standards, requirements, and guidelines for the establishment of reasonable rates charged for basic cable service by a cable operator not subject to effective competition.

"(5) A cable operator may file with the Commission, or with a franchising authority authorized by the Commission under paragraph (2) to regulate rates, a request for a rate increase in the price of a basic cable service tier. Any such request upon which final action is not taken within 180 days after such request shall be deemed granted.

"(c)(1) When a franchising authority or a subscriber of any cable system found by the Commission not to be subject to effective competition files, within a reasonable time after a rate increase for cable programming service of that system, including an increase which results from a change in that system's service tiers or from a change in the per channel rate paid by subscribers for a particular video programming service, a complaint which establishes a prima facie case that rates for such cable programming service are unreasonable based on the criteria established by the Commission, the Commission shall determine whether such rates for cable programming service are unreasonable. In making its determination, the Commission shall inquire of the cable operator of such system as to the reasons for such rates. If the Commission finds that such rates cannot be justified under reasonable business practices, the Commission shall establish reasonable rates.

"(2) Within 180 days after the date of enactment of the Cable Television Consumer Protection Act of 1991, the Commission shall prescribe by rule—

"(A) the criteria for determining whether rates for cable programming service are unreasonable, and

"(B) criteria for determining that (i) a complaint described under paragraph (1) is filed within a reasonable period after a rate increase and (ii) the complaint establishes a prima facie case that rates for cable programming service are unreasonable.

"(3) In establishing the criteria for determining whether rates for cable programming service are unreasonable pursuant to paragraph (2)(A), the Commission shall consider, among other factors—

"(A) the extent to which service offerings are offered on an unbundled basis;

"(B) rates for similarly situated cable systems offering comparable services, taking into account, among other factors, similarities in facilities, regulatory and governmental costs, and number of subscribers;

"(C) the history of rates for such service offerings of the system;

"(D) the rates for all cable programming service offerings taken as a whole; and

"(E) the rates for such service offerings charged by cable systems subject to effective competition, as defined in subsection (d).

"(d) Under this section, a cable system shall be presumed to be subject to effective competition if—

"(1) fewer than 30 percent of the households in the cable community subscribe to the cable service of such cable system; or

"(2) the cable community is served by a sufficient number of local television broadcast signals and by more than one multichannel video programming distributor.

For purposes of paragraph (2), a cable community shall be considered as served by more than one multichannel video programming distributor if (A) comparable video programming is available at comparable rates to at least a majority of the households in the cable community from a competing cable operator, multichannel multipoint distribution service, direct broadcast satellite program distributor, television receive-only satellite program distributor, or other competing multichannel video programming distributor, and (B) the number of households subscribing to programming services offered by such competing multichannel video programming distributor, or by a combination of such distributors, is in the aggregate at least 15 percent of the households in the cable community. No competing multichannel video programming distributor serving households in a cable community which, directly or indirectly, is owned or controlled by, or affiliated through substantial common ownership with, the cable system in that cable community, shall be included in any determination regarding effective competition under this subsection.

"(e) Nothing in this title shall be construed as forbidding any Federal agency, State, or franchising authority from—

"(1) prohibiting discrimination among customers of cable service; or

"(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing-impaired individuals.

"(f) For purposes of this section, the term 'cable programming service' means all video programming services, including installation or rental of equipment not used for the receipt of basic cable service, regardless of service tier, offered over a cable system except basic cable service and those services offered on a per channel or per program basis.

"(g) Within 120 days of enactment of this subsection, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions of the rates, services, and other requirements of this section.".

NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING

SEC. 6. Part IV of title VI of the Communications Act of 1934 (47 U.S.C. 551 et seq.) is amended by adding at the end the following new sections:

"NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING

"SEC. 640. (a) A video programmer in which a cable operator has an attributable interest and who licenses video programming for national or regional distribution—

"(1) shall not unreasonably refuse to deal with any multichannel video programming distributor; and

"(2) shall not discriminate in the price, terms, and conditions in the sale of the video programmer's programming among cable systems, cable operators, or other multichannel video programming distributors if such action would have the effect of impeding retail competition.

"(b) A video programmer in which a cable operator has an attributable interest and who licenses video programming for national or regional distribution shall make programming available on similar price, terms, and conditions to all cable systems, cable operators, or their agents or buying groups: *Provided however,* That such video programmer may—

"(1) impose reasonable requirements for creditworthiness, offering of service, and financial stability;

"(2) establish different price, terms, and conditions to take into account differences in cost in the creation, sale, delivery, or transmission of video programming;

"(3) establish price, terms, and conditions which take into account economies of scale or other cost savings reasonably attributable to the number of subscribers served by the distributor; and

"(4) permit price differentials which are made in good faith to meet the equally low price of a competitor.

"(c) The Commission shall prescribe rules and regulations to implement this section. The Commission's rules shall—

"(1) provide for an expedited review of any complaints made pursuant to this section; and

"(2) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(d) Any person who encrypts any satellite cable programming for private viewing shall make such programming available for private viewing by C-band receive-only home satellite antenna users.

"(f) This section shall not apply to the signal of an affiliate of a national television broadcast network or other television broadcast signal that is retransmitted by satellite and shall not apply to any internal satellite communication of any broadcaster, broadcast network, or cable network.

"(g) For purposes of this section, any video programmer who licenses video programming for distribution to more than one cable community shall be considered a regional distributor of video programming. Nothing contained in this section shall require any person who licenses video programming for national or regional distribution to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

"AGREEMENTS BETWEEN CABLE OPERATORS AND VIDEO PROGRAMMERS

"SEC. 641. Within one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators and video programmers. Such regulations shall—

"(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

"(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programmer to provide exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

"(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programmer to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation in the selection, terms, or conditions for carriage of video programmers;

"(4) provide for expedited review of any complaints made by a video programmer pursuant to this section; and

"(5) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.".

LEASED COMMERCIAL ACCESS

SEC. 7. (a) Section 612(a) of the Communications Act of 1934 (47 U.S.C. 532(a)) is amended by inserting "to promote competition in the delivery of diverse sources of video programming and" immediately after "purpose of this section is".

(b) Section 612(c) of the Communications Act of 1934 (47 U.S.C. 532(c)) is amended—

(1) in paragraph (1) by inserting "and with rules prescribed by the Commission under paragraph (4)" immediately after "purpose of this section"; and

(2) by adding at the end the following new paragraph:

"(4)(A) The Commission shall have the authority to—

"(i) determine the maximum reasonable rates that a cable operator may establish pursuant to paragraph (1) for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use; and

"(ii) establish reasonable terms and conditions for such use, including those for billing and collection.

"(B) Within 180 days after the date of enactment of this paragraph, the Commission shall establish rules for determining the maximum reasonable rate under subparagraph (A)(i) and for establishing terms and conditions under subparagraph (A)(ii).".

(c) Paragraph (5) of section 612(b) of the Communications Act of 1934 (47 U.S.C. 532(b)) is amended to read as follows:

"(5) For the purposes of this section, the term 'commercial use' means the provision of video programming, whether or not for profit.".

LIMITATIONS ON CONTROL AND UTILIZATION

SEC. 8. Subsection (f) of section 613 of the Communications Act of 1934 (47 U.S.C. 533) is amended to read as follows:

"(f)(1) In order to enhance effective competition, the Commission shall, within one year after the date of enactment of the Cable Television Consumer Protection Act of

1990, conduct a rulemaking proceeding to prescribe rules and regulations establishing—

"(A) reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest; and

"(B) reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.

"(2) In prescribing rules and regulations under paragraph (1), the Commission shall, among other public interest objectives—

"(A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer;

"(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of such programming to other video distributors;

"(C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;

"(D) account for any efficiencies and other benefits that might be gained through increased ownership or control;

"(E) make such rules and regulations reflect the dynamic nature of the communications marketplace;

"(F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and

"(G) not impose limitations which would impair the development of diverse and high quality video programming.".

CROSS-OWNERSHIP

SEC. 9. (a) Section 613(a) of the Communications Act of 1934 (47 U.S.C. 533(a)) is amended—

(1) by inserting "(1)" immediately after "(a)"; and

(2) by adding at the end the following new paragraph:

"(2) It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the cable community served by that cable operator's cable system. The Commission—

"(A) shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services and satellite master antenna television services which are owned by a cable operator on the date of enactment of this paragraph; and

"(B) may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of the affected cable community are able to obtain video programming.".

(b) Section 613(c) of the Communications Act of 1934 (47 U.S.C. 533(c)) is amended—

(1) by inserting "(1)" immediately after "(c)"; and

(2) by adding at the end the following new paragraph:

"(2) If ten percent of the households in the United States with television sets subscribe to service provided by multichannel video programming distributors directly via satellite to home satellite antennae, the Commission shall promulgate appropriate regulations (A) limiting ownership of any such distributor by cable operators or any person having other media interests and (B) requiring access to such satellite service by unaffiliated video programmers.".

CUSTOMER SERVICE

SEC. 10. (a) Section 632(a) of the Communications Act of 1934 (47 U.S.C. 552(a)) is amended by inserting "may establish and" immediately after "authority" and in paragraph (1) by inserting immediately after "operator" the following: "that (A) subject to the provisions of subsection (e), exceed the standards set by the Commission under this section, or (B) prior to the issuance by the Commission of rules pursuant to subsection (d)(1), exist on the date of enactment of the Cable Television Consumer Protection Act of 1991".

(b) Section 632 of the Communications Act of 1934 (47 U.S.C. 552) is amended by adding at the end the following new subsections:

"(d)(1) The Commission, within 180 days after the date of enactment of this subsection, shall, after notice and an opportunity for comment, issue rules that establish customer service standards that ensure that all customers are fairly served. Thereafter the Commission shall regularly review the standards and make such modifications as may be necessary to ensure that customers of the cable industry are fairly served. A franchising authority may enforce the standards established by the Commission.

"(2) Notwithstanding the provisions of subsection (a) and this subsection, nothing in this title shall be construed to prevent the enforcement of—

"(A) any municipal ordinance or agreement in effect on the date of enactment of this subsection, or

"(B) any State law,

concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section.

"(e) In the event that a particular franchising authority, pursuant to its authority under subsection (a), requires provisions for enforcement of customer service requirements of the cable operator that exceed the standards established by the Commission, the cable operator may petition the Commission for a declaration, after notice and hearing and based upon substantial evidence, that the particular franchising authority's requirements are not in the public interest. In determining whether a particular franchising authority's provisions for enforcement of customer service requirements are not in the public interest, the Commission shall consider the needs of the local area served by the particular franchising authority.".

FRANCHISE RENEWAL

SEC. 11. (a) Section 626(a) of the Communications Act of 1934 (47 U.S.C. 546(a)) is amended by adding at the end the following: "Submission of a timely written renewal notice by the cable operator specifically requesting a franchising authority to initiate the formal renewal process under this section is required for the cable operator to invoke the renewal procedures set forth in subsections (a) through (g); except that nothing in this section requires a franchising authority to commence the renewal proceedings during the 6-month period which begins with the 36th month before the franchise expiration.".

(b) Section 626(c)(1) of the Communications Act of 1934 (47 U.S.C. 546(c)(1)) is amended—

(1) by inserting "pursuant to subsection (b)" immediately after "renewal of a franchise"; and

(2) by striking "completion of any proceedings under subsection (a)" and inserting in lieu thereof the following: "date of the submission of the cable operator's proposal pursuant to subsection (b)".

(c) Section 626(c)(1)(A) of the Communications Act of 1934 (47 U.S.C. 546(c)(1)(A)) is amended by inserting "throughout the franchise term" immediately after "law".

(d) Section 626(c)(1)(B) of the Communications Act of 1934 (47 U.S.C. 546(c)(1)(B)) is amended—

(1) by striking "mix, quality, or level" and inserting in lieu thereof "mix or quality"; and

(2) by inserting "throughout the franchise term" immediately after "needs".

(c) Section 626(d) of the Communications Act of 1934 (47 U.S.C. 546(d)) is amended—

(1) by inserting "which has been submitted in compliance with subsection (b)" immediately after "Any denial of a proposal for renewal"; and

(2) by striking all after "unless" and inserting in lieu thereof the following: "the operator has notice and opportunity to cure, or in any case in which it is documented that the franchising authority has waived in writing its right to object.".

(f) Section 626(e)(2)(A) of the Communications Act of 1934 (47 U.S.C. 546(e)(2)(A)) is amended by inserting immediately after "section" the following: "and such failure to comply actually prejudiced the cable operator".

(g) Section 626 of the Communications Act of 1934 (47 U.S.C. 546) is amended by adding at the end the following new subsection:

"(i) Notwithstanding the provisions of subsections (a) through (h), any lawful action to revoke a cable operator's franchise for cause shall not be negated by the initiation of renewal proceedings by the cable operator under this section.".

REQUIREMENT FOR CERTAIN EQUIPMENT ON TELEVISION SETS

SEC. 12. Section 303(s) of the Communications Act of 1934 (47 U.S.C. 303(s)) is amended—

(1) by inserting ", and be equipped with an electronic switch permitting users of the apparatus to change readily among all video distribution media," immediately after "television broadcasting"; and

(2) by inserting immediately before the period at the end the following: ", except that such electronic switch shall be required only if the Commission determines that the installation of the switch is technically and economically feasible".

LIMITATION OF FRANCHISING AUTHORITY LIABILITY

SEC. 13. Part III of title VI of the Communications Act of 1934 (47 U.S.C. 621 et seq.) is amended by adding at the end the following new section:

"LIMITATION OF LIABILITY

"SEC. 628. (a) In any court proceeding pending on the date of enactment of this section, or initiated after such date, involving any claim under the Civil Rights Acts asserting a violation of first amendment constitutional rights by a franchising authority or other governmental entity or by any official, member, employee, or agent of such authority or entity, arising from actions expressly authorized or required by this title, any relief shall be limited to injunctive relief, declaratory relief, and attorney's fees and legal costs, except as provided in subsection (b).

"(b) The limitation required by subsection (a) shall not apply to actions that, prior to such violation, have been determined by a final order of a court of binding jurisdiction, no longer subject to appeal, to be in violation of constitutional rights under the first amendment or of the Civil Rights Acts.".

MINIMUM TECHNICAL STANDARDS

SEC. 14. Section 624(e) of the Communications Act of 1934 (47 U.S.C. 544(e)) is amended to read as follows:

"(e)(1) The Commission shall, within one year after the date of enactment of the Cable Television Consumer Protection Act of 1990, establish minimum technical standards to ensure adequate signal quality for all classes of video programming signals provided over a cable system, and thereafter shall periodically update such minimum standards to reflect improvements in technology.

"(2) The Commission may establish standards for technical operation and other signals provided over a cable system including but not limited to high-definition television (HDTV).

"(3) The Commission may require compliance with and enforce any standard established under this subsection, adjusted as appropriate for the particular circumstances of the local cable system and cable community.

"(4) The Commission shall establish procedures for complaints or petitions asserting the failure of a cable operator to meet the technical standards and seeking an order compelling compliance; except that nothing in this subsection shall be construed to limit the ability of a complainant or petitioner to seek any other remedy that may be available under the franchise agreement or State or Federal law or regulation.

"(5) After the establishment of technical standards by the Commission pursuant to this section, neither a State or political subdivision thereof, nor a franchising authority or other governmental entity of a State or political subdivision thereof, shall—

"(A) establish any technical standards described in this subsection;

"(B) enforce any such standards that have not been established by the Commission; or

"(C) enforce any such standards that are inconsistent with the standards established by the Commission.".

REQUIREMENT TO CARRY LOCAL BROADCAST SIGNALS

SEC. 15. Part II of title VI of the Communications Act of 1934 (47 U.S.C. 531 eq seq.) is amended by inserting immediately after section 613 the following new sections:

"CARRIAGE OF LOCAL COMMERCIAL BROADCAST SIGNALS

SEC. 614. (a) Each cable operator that relies upon compulsory licensing pursuant to section 111 of title 17, United States Code, for secondary transmissions by its cable system (hereafter in this section referred to as a 'participating operator') shall carry the signals of qualified local commercial broadcast stations in accordance with the provisions of this section.

"(b)(1) A participating operator of a cable system with 12 or fewer usable activated channels shall carry the signals of a minimum of three qualified local commercial broadcast signals.

"(2) A participating operator of a cable system with more than 12 usable activated channels shall carry the number of signals of qualified local commercial broadcast stations that is equal to one-third of the aggregate number of usable activated channels of such system.

"(c)(1) Whenever the number of qualified local commercial broadcast stations exceeds the minimum number of signals of such stations that a participating operator of a cable system is required to carry under this section, the participating operator shall have discretion in selecting which signals shall be carried on its cable system in order to meet the carriage requirements of this section; except that if the participating operator elects to carry an affiliate of a broadcast network entity, such operator shall carry the affiliate of such broadcast network entity whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations, or any successor regulations thereto, is closest to the principal headend of the cable system. The carriage of each signal of a qualified local commercial broadcast station shall be included in determining whether a participating operator of a cable system has complied with the requirements of this section, even if the signal of one such station substantially duplicates that of another station. For purposes of this paragraph, the term 'broadcast network entity' means an organization which produces programs available for simultaneous transmission by 10 or more affiliated broadcast stations and which has distribution locality or circuits available to such affiliated stations at least 12 hours each day.

"(2) Each signal carried in fulfillment of carriage obligations of a participating operator of a cable system under this section shall be carried on the cable system channel number on which the qualified local commercial broadcast station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the broadcaster, or on such other channel number as mutually agreed upon by the broadcaster and the participating operator. Any disputes regarding the positioning of a qualified local commercial broadcast station shall be resolved by the Commission.

"(3) A participating operator of a cable system shall carry in its entirety the primary video and accompanying audio transmission of each of the qualified local commercial broadcast stations the operator selects to carry in accordance with this section. Retransmission of material in the vertical blanking interval or other enhancements of the primary video and audio signal (including multi-channel sound, teletext, and materials carried on subcarriers) shall be within the discretion of the participating operator.

"(4) The signals of a qualified local commercial broadcast station that are carried on the cable system of a participating operator shall be carried without material degradation.

"(5) A participating operator of a cable system shall not be required to carry the signal of any qualified local commercial broadcast station that substantially duplicates the signal of another qualified local commercial broadcast station that is carried by the operator.

"(6) Signals carried in fulfillment of carriage obligations of a participating operator under this section shall be available on the lowest priced tier of service separately available to each cable subscriber to which subscription is required for access to all other tiers of service. Such signals shall be viewable via cable on all television receivers of a subscriber connected to a cable system by a cable operator. If a participating operator of a cable system authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment or materials for such connections, the operator shall notify such subscribers in writing of all broadcast stations within 50 miles of the principal headend of the cable system that are not available without a cable converter box and shall offer to sell or lease such a converter box to such subscribers.

"(7) A participating operator shall identify, upon request by any person, those signals carried in fulfillment of the signal carriage obligations of the operator under this section.

"(8) A participating operator of a cable system shall provide written notice to a qualified local commercial broadcast station, the franchising authority of such cable system, and subscribers of such cable system at least 30 days prior to either deleting from carriage or repositioning the signal of that qualified local commercial broadcast station. No such deletion or repositioning shall occur during a sweeps period in which major television rating services measure the size of audience of qualified local commercial broadcast stations.

"(9) A participating operator of a cable system shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local commercial broadcast station carried in fulfillment of signal carriage obligations of the operator under this section, except that any such station may be required to bear any cost associated with delivering to the headend of the cable system a signal of the quality defined in section 602(20).

"(d)(1) Whenever a qualified local commercial broadcast station believes that a participating operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such operator has failed to comply with such requirements and state the basis for such allegations.

"(2) The Commission shall afford such participating operator an opportunity to present data, views, and arguments to establish that the operator has complied with the signal carriage requirements of this section.

"(3) Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the participating operator has complied with the requirements of this section. If the Commission determines that the participating operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the participating operator has fully complied with such requirements, the Commission shall dismiss the complaint.

"CARRIAGE OF NONCOMMERCIAL EDUCATIONAL TELEVISION SIGNALS

"SEC. 615. (a) In addition to the carriage requirements set forth in section 614, each operator of a cable system (hereafter in this section referred to as an 'operator') shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section. The provisions of this section apply without regard for whether the operator is a participating operator as defined in section 614(a).

"(b)(1) Subject to paragraphs (2) and (3) and subsection (e), each operator shall carry, on the cable system of that operator, each qualified local noncommercial educational television station requesting carriage.

"(2)(A) Notwithstanding paragraph (1), an operator of a cable system with 12 or fewer usable activated channels shall be required to carry the signal of only one qualified local noncommercial educational television station; except that an operator of such a system shall comply with subsection (c) and may, in its discretion, carry the signals of other qualified noncommercial educational television stations.

"(B) In the case of a cable system described in subparagraph (A) which operates beyond the presence of any qualified local noncommercial educational television station—

"(i) the operator shall carry on that system the signal of one qualified noncommercial educational television station;

"(ii) the selection for carriage of such a signal shall be at the election of the operator; and

"(iii) in order to satisfy the requirements for carriage specified in this subsection, the operator of the system shall not be required to remove any other programming service actually provided to subscribers on March 29, 1990; except that such operator shall use the first channel available to satisfy the requirements of this subparagraph.

"(3)(A) Subject to subsection (c), an operator of a cable system with 13 to 36 usable activated channels—

"(i) shall carry the signal of at least one qualified local noncommercial educational television station but shall not be required to carry the signals of more than three such stations, and

"(ii) may, in its discretion, carry additional such stations.

"(B) In the case of a cable system described in this paragraph which operates beyond the presence of any qualified local noncommercial educational television station, the operator shall import the signal of at least one qualified noncommercial educational station to comply with subparagraph (A)(i).

"(C) The operator of a cable system described in this paragraph which carries the signal of a qualified local noncommercial educational station affiliated with a State public television network shall not be required to carry the signal of any additional qualified local noncommercial educational television station affiliated with the same network if the programming of such additional station is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage.

"(D) An operator of a system described in subparagraph (A) which increases the usable activated channel capacity of the system to more than 36 channels on or after March 29, 1990 shall, in accordance with the other provisions of this section, carry the signal of each qualified local noncommercial educational television station requesting carriage, subject to subsection (e).

"(c) Notwithstanding any other provision of this section, all operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990. The requirements of this subsection may be waived with respect to a particular operator and a particular such station, upon the written consent of the operator and the station.

"(d) An operator required to add the signals of qualified local noncommercial educational television stations to a cable system under this section may do so by placing such additional stations on public, educational, or governmental channels not in use for their designated purposes.

"(e) An operator of a cable system with a capacity of more than 36 usable activated channels which is required to carry the signals of three qualified local noncommercial educational television stations shall not be required to carry the signals of additional such stations the programming of which substantially duplicates the programming broadcast by another qualified local noncommercial educational television stations requesting carriage. Substantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services.

"(f) A qualified local noncommercial educational television station whose signal is carried by an operator shall not assert any network non-duplication rights it may have pursuant to section 76.92 of title 47, Code of Federal Regulations, to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that operator.

"(g)(1) An operator shall retransmit in its entirety the primary video and accompanying audio transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the operator.

"(2) An operator shall provide each qualified local noncommercial educational television station whose signal is carried in accordance with this section, with bandwidth and technical capacity equivalent to that provided to commercial television broadcast stations carried on the cable system and shall carry the signal of each qualified local noncommercial educational television station without material degradation.

"(3) The signal of a qualified local noncommercial educational television station shall not be repositioned by an operator unless the operator, at least 30 days in advance of such repositioning, has provided written notice to the station and all subscribers of the cable system. For purposes of this paragraph, repositioning includes (A) assignment of a qualified local noncommercial educational television station to a cable system channel number different from the cable system channel number to which the station was assigned as of March 29, 1990, and (B) deletion of the station from the cable system.

"(4) Notwithstanding the other provisions of this section, an operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality, as may be defined by the Commission.

"(h) Signals carried in fulfillment of the carriage obligations of an operator under this section shall be available to every subscriber as part of the cable system's lowest priced service that includes the retransmission of local television broadcast signals.

"(i)(1) An operator shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local noncommercial education television station carried in fulfillment of the requirements of this section, except that such a station may be required to bear the cost associated with delivering a good quality signal to the principal headend of the cable system.

"(2) Notwithstanding the provisions of this section, an operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection (c), where such signal would be considered as a distant signal for copyright purposes unless such station reimburses the operator for the incremental copyright costs assessed against such operator as a result of such carriage.

"(j)(1) Whenever a qualified local noncommercial educational television station believes that an operator of a cable system has failed to comply with the signal carriage requirements of this section, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such operator has failed to comply with such requirements and state the basis for such allegations.

"(2) The Commission shall afford such participating operatör an opportunity to present data, views, and arguments to establish that the operator has complied with the signal carriage requirements of this section.

"(3) Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the operator has complied with the requirements of this section. If the Commission determines that the operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the operator has fully complied with such requirements, the Commission shall dismiss the complaint.

"(k) An operator shall identify, upon request by any person, those signals carried in fulfillment of the requirements of this section.

"(l) For purposes of this section, 'qualified local noncommercial educational television station' is defined as a qualified local noncommercial educational television station—

"(A) which is licensed to a principal community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (as in effect on March 29, 1990), or any successor regulations thereto, is within 50 miles of the principal headend of the cable system; or

"(B) whose Grade B service contour, as defined in section 73.683(a) of such title (as in effect on March 29, 1990), or any successor regulations thereto, encompasses the principal headend of the cable system.".

JUDICIAL REVIEW

SEC. 16. Section 635 of the Communications Act of 1934 (47 U.S.C. 555) is amended by adding at the end the following new subsection:

"(c)(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 614 of this Act or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

"(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 614 of this Act or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.".

HOME WIRING

SEC. 17. Section 624 of the Communications Act of 1934 (17 U.S.C. 544) is amended by adding at the end the following new subsection:

"(g) Within 120 days after the date of enactment of this subsection, the Commission shall prescribe rules and regulations concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.".

SEPARABILITY

SEC. 18. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 19. Except as otherwise specified in this Act, the requirements of this Act shall be effective 60 days after the date of enactment of this Act. The Federal Communications Commission may promulgate such regulations as it determines necessary to interpret such requirements that are not inconsistent herewith.

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Senator EXON. There are no further opening statements at this juncture, as I understand it. We will be returning to some opening statements when we have a chance, but it is very possible that we are going to have more than one vote, depending on the development of things on the floor. So unfortunately, as important as this is, there probably is going to be a lot of coming and going by Senators during this particular hearing.

I understand you have no opening statement, Senator Breaux.

Senator BREAUX. I am going to wait for all my colleagues to get here at some point.

Senator EXON. Senator Lieberman is to be our first witness, and he is not back at the present time. In order to keep things moving here, we will begin with the first panel, and we will work Senator Lieberman in, depending upon his time, as we go along.

At this time I would like to call panel number one, the Honorable Sharpe James, the Mayor of Newark, New Jersey, and the Honorable David Adkisson, the Mayor of Owensboro, Kentucky, to the witness table. We will start out, then, with the testimony from Mayor James.

Mayor, we are very pleased to recognize you at this time.

Senator EXON. Is there anyone here?

[Pause.]

Senator EXON. Let us try the second panel.

Mayor Adkisson, thank you very much for being here. We are pleased to accept your testimony at this time.

STATEMENT OF DAVID ADKISSON, MAYOR, OWENSBORO, KY

Mr. ADKISSON. Thank you, Senator Exon and Members of the subcommittee. I thank you for this opportunity to appear before you and to share my community's feelings about cable television. I am the Mayor of Owensboro, Kentucky, which is perhaps best known as the hometown of your colleague, Senator Wendell Ford. We are a mid-sized community of 50,000 people in Western Kentucky.

We have had a cable system for nearly 20 years, and our present 20-year franchise expires later this year. Since we are presently in the process of renewing our cable franchise under current Federal law, I would like to share a few frustrations that my constituents face regarding the cable television industry.

The franchise renewal experience in Owensboro is typical of what is occurring on a national level in the aftermath of deregulation under the Cable Act of 1984. It is estimated that over 8,000 communities across our Nation will confront the process of renewing their franchises within the next few years. If they have not already, they will confront the problems we are confronting in our community.

There are several problems. One, the biggest problem for our citizens has been the problem of rates. That is what we hear about the most. During the past year we have had two rate increases in our community. Our full basic cable service increased to $20.95 per month, a 40 percent increase over the last 12 months. I know there are numerous other cities in Kentucky which face the same problem, and I have included some information on them in the written testimony which I have submitted.

Senator EXON. Without objection, we will accept your written testimony and that of all of the other witnesses today.

Mr. ADKISSON. Thank you, sir.

I have with me signatures from at least a dozen additional mayors who would like to concur with the 600 mayors who have already signed the letters to this effect.

Senator EXON. Those will be accepted as a part of the record by reference.

Mr. ADKISSON. Thank you.

When our Kentucky League of Cities sponsors a forum on cable television, it is standing room only. It is a hot topic with all our cities from the smallest to the largest. All over the country citizens are screaming about dramatic rate increases, and some communities have major problems with customer service and lack of responsiveness by cable companies.

Recently I raised questions in Owensboro about cable rates, and I can assure you I have had more response, more calls, and more letters about cable than anything else I have experienced in the few years I have been in office. The complaints are not just from people on a fixed income who cannot afford to write a $20 or $25 check for basic service. They are also from the wealthy and the CEO's who resent the seemingly arbitrary increases.

Secondly, there is the problem of those of us in local government. We are held responsible. We are expected to control rates. After all, the cable company uses our utility poles, and we grant them a franchise; therefore, why can we not control rates?

The bottom line is cities are absolutely helpless when it comes to controlling rates of cable television. Since the 1984 Cable Act, we have lost all control over the major cable problems which citizens are concerned about. Sure, we can negotiate an access channel and various other points of a franchise, but those are not the major issues affecting people.

Mayor Sharpe James of Newark and I and thousands of other mayors do not come before you today because of any financial interest in cable. Last year, our franchise fee in our small city yielded approximately $100,000 for the city budget out of approximately a $25 million budget. I assumed we would get a franchise fee of some sort, regardless of whether cable television is regulated. Our concern, therefore, is not a selfish concern or financial concern for cities. Our concern is for our citizens who are the customers of cable TV and who feel frustrated and helpless.

Of course, our basic problem with cable on the local level is that it is a monopoly. In Owensboro we have had a nonexclusive contract for our entire 20 years; yet, no meaningful competition has evolved. As a practical matter, it is a monopoly.

The cable industry has the best of both worlds. They have one hand in the private sector—that is, they make a handsome profit as a private business—and one hand in the public sector—that is, we grant them a franchise and let them use our utility poles. They receive the benefits of both public and private sectors but without bearing the responsibility for being in either. In that sense, they are neither fish nor fowl.

Another significant problem is the franchise renewal process, which my community is in right now. Franchise renewal reminds me of a Soviet election. The government puts on an election, but everybody knows there is only one candidate on the ballot. That is how city governments feel when it is time for franchise renewal. We are just going through the motions.

Renewing a franchise is not a negotiating process between the city and the cable company the way it stands under the Cable Act of 1984. In reality, it becomes a process in which we, the city officials, go out and try to explain to the public all the things we cannot do. These are some of our problems, and, of course, we are looking for solutions to these problems.

We feel the real solutions lie in legislation that will protect the consumer. The cities of this country would like to see competition, meaningful competition.

We feel local communities ought to have the ability to regulate rates. A cable company should have to go before the citizens and justify rate increases.

We feel there needs to be a truly competitive renewal process.

Also, in our opinion all cable operators should have equal access to programming.

We are also asking for a damage immunity provision to protect cities during our efforts to regulate the industry and promote competition.

Also, we are asking for the FCC's help to update minimum technical and consumer service standards. Cities need the authority to require tougher consumer-oriented standards for cable reception, and we need consumer protection standards that reflect local needs.

I have elaborated on all these points in my written statement that has been submitted.

In conclusion, the 1984 Cable Act was just that. It was a cable act. In 1991 this bill is a cable television consumer act. The difference is highly significant, and we support the way you are moving. At the grassroots level our citizens are mad. As cities, we have our hands tied. About all we can say is write your Congressman. It is time for the pendulum that was swinging toward the cable industry in 1984 to swing back toward the consumer now in 1991.

Cities around the country join Mayor James and me in thanking you for what you are doing. Gentlemen, we feel your committee is doing an outstanding job of moving in the right direction, and I hope that the 55 million cable consumers around the country appreciate your efforts. We certainly do. Thank you very much.

[The statement follows:]

TESTIMONY OF DAVID C. ADKISSON MAYOR OF OWENSBORO, KENTUCKY, CONCERNING THE CABLE TELEVISION CONSUMER PROTECTION ACT OF 1991 AND OTHER CABLE ISSUES

Mr. Chairman and other distinguished members
of the Communications Sub-Committee:

On behalf of Owensboro, Kentucky, I would like to express my sincere gratitude for the opportunity to share with you our concerns and thoughts regarding current legislative efforts to address evolving inequities of the Cable Communications Policy Act of 1984. The citizens of Owensboro, like thousands of other communities across this nation, are frustrated and angered by what is perceived as the lack of effort by local government officials to pressure cable television operators to provide quality programming and services at an affordable price. Owensboro is currently served by one multi-channel cable system owned and operated by Century Communications Corporation. Our current franchise was awarded in 1971 and expires December 9, 1991. Presently, Owensboro is entering the critical phase of the formal franchise renewal process under the Cable Act of 1984.

A Citizens Advisory Committee on Cable Television was commissioned to evaluate the performance of Owensboro Cablevision (Subsidiary of Century Communications Corporation) under the current franchise, and to identify future cable needs in our community. In the process, the Committee has conducted public hearings, forums, and surveys to address public opinion and attitudes toward the performances of our cable operator. The franchise renewal process has proved to be an educational experience for local government officials and citizens alike. Having experienced franchise renewal under current federal law, I can attest and confirm first hand many of the concerns and frustrations of my constituents concerning the cable television industry.

Mayors across the nation have, or soon will, confront their constituents' complaints about cable service that inevitably arise during the franchise renewal process. Local government officials can no longer ignore the impact this sophisticated multi-channel delivery system medium has on our communities. Because of its ability to deliver a variety of entertainment, news and information services into our living rooms, the cable industry is here to stay. By some accounts, over 66% of all communities nationwide are served by a cable television system. For all intents and purposes cable is television. Astonishingly, over 90% of these cable systems are not subject to any effective competition as that term is currently defined and understood under federal law. Within the next five (5) years, over 8,000 cable television systems will be up for renewal or sale.

At this critical juncture, municipalities, and more importantly, consumers of cable television service need legislative help to restore some degree of sanity to the cable industry.

The lessons in the aftermath of deregulation under the Cable Policy Act of 1984, are quite disturbing. The Act sought to achieve some degree of competition and regulation, but apparently achieved neither. What Cities are left with is an unregulated, natural monopoly that is insensitive and unresponsive to growing consumer complaints about poor service and excessive rates.

From our perspective, the Act effectively removed any authority of local officials to address the majority of the complaints of their constituents. In the absence of a competitive marketplace or rate regulatory authority, cable companies have been granted an unfettered license to conduct a highly profitable enterprise across public right-of-way without regard to the needs of individual communities who make the enterprise possible. Locally elected officials should have the right, as well as the responsibility, to promote a policy that fosters competition in the local marketplace. Competition under the current statutory scheme does not exist.

Our franchise is non-exclusive and no other cable operator has ever offered to compete with the present operator. While the authors of the Cable Act may have envisioned non-competitive renewals as a way to encourage reinvestment in the local systems for capital improvements and customer service, that has not been the case in Owensboro. Poor picture quality and poor customer service are frequent complaints. The overall result of the Cable Act which does not allow for competition or rate regulation has been a decrease in the technical quality of cable service accompanied by a dramatic increase in subscription rates.

For example, from April, 1990, to March, 1991, the basic monthly subscription rate for cable service in Owensboro went from $14.95 to $20.95, an increase of forty percent (40%) in one year. Given the service we receive, it is clear that this is a rate the market will bear and is not reflective of a cost-based rate. With the current definition of "effective competition" under FCC rules, Owensboro receives three or more grade B broadcast signals over-the-air, and therefore, local government has no ability to regulate the rates for basic service charged by Owensboro Cablevision.

As a result of intensive educational efforts by the Citizens Advisory Committee, the general public has reacted harshly to the reality that government officials lack the authority to regulate rates. Further, because of the lack of competition and the inability to regulate rates, elected officials are perceived as being unresponsive to the needs and demands of our constituents. The people have spoken and it is time for their voice to be heard.

Congress must act to provide local officials with appropriate oversight and open the cable television industry to realistic competition and local regulation. If cable operators know that they will face competition during the franchise renewal process, they will have a much greater incentive to provide quality cable service at an affordable rate during the life of the franchise. At present, seven (7) cable television bills have been introduced in the 102nd Congress, of which Senate Bill 12 is one. The City of Owensboro joins with the U.S. Conference of Mayors, the National League of Cities, and the Kentucky League of Cities, in calling upon Congress to support legislative efforts to redress the excesses of the cable industry and return them to a truly competitive environment. Local governments believe that the core elements of such legislation should address the following:

1. RATE REGULATION AND COMPETITION.

We prefer a competitive marketplace to regulated monopolies. However, our experience in Owensboro and the Kentucky Cable Service Fee Summary attached hereto as Exhibit A, adequately demonstrates the need for a regulatory process to assure that rates are reasonable based on rate regulation conducted by cities under parameters set by the FCC of which major components should be capital investment in the cable plant and expenses, such as personnel, to ensure good customer service. Owensboro and other cities have a first-hand knowledge of the system and this is invaluable knowledge for a fair rate setting process. We would like to see the percent of subscribers taking the basic tier to be regulated to be raised to at least 50% so that rate regulation would have a substantial impact in the community.

In competition situations, rate regulations would not be needed. Senate Bill 12 and others attempt to redefine "effective competition" under current FCC Rules. The Cable Act should contain a more realistic definition of "effective competition." In our view, realistic competition is not occurring unless your community is served by more than one multi-channel provider, and this is recognized in the definition of "effective competition" in Senate Bill 12. We support the idea that local cable operators should be subject to head-to-head competition wherever physically and economically feasible, and in the hands of local officials. The extent of cable penetration in local communities and the existence of alternative multi-channel providers should be the benchmark of any attempts to redefine "effective competition."

Also, it is recognized that the transition to a truly competitive market environment will take time. Industry competition may emanate from many sources, the most notable of which are the telephone companies. TELCOS already have access to public right-of-way and with the advances in fiber optics technology, they have the capability to deliver a variety of quality programming services at an affordable price. Congress is urged to consider lifting FCC restrictions barring TELCOS from entering the cable marketplace. In addition, it is most important to provide appropriate safeguards to protect consumers from the exchange of one (1) monopoly situation over another. TELCO's choosing to enter the cable marketplace should be required to obtain a franchise from local authorities who may grant or deny such a franchise on the basis of the applicants financial and technical ability and the needs of the local community.

Competition may also emanate from municipalities themselves. Frankfort and Glasgow, Kentucky, have operated their own cable television systems quite successfully for some time. This head-to-head competition has produced the desired stability in basic subscription rates charged by the private operator (see comments from other cities in exhibit B). "Overbuild" through private as well as municipal cable systems is encouraged as an avenue for enhancing a competitive cable environment.

2. COMPETITIVE RENEWAL PROCESS.

The Cable Act establishes complex and ambiguous renewal provisions which favor the incumbent operator and are inconsistent with normal City franchising practices. These provisions will be very difficult for cities to implement in a manner which addresses community concerns and makes the renewal applicant accountable for compliance under the cable franchise. The competitive threat of a new cable entrant, through the potential denial of the franchise renewal, does not exist under the current statutory renewal scheme.

In Owensboro, our frustration mounts as we proceed through the quagmire of franchise renewal. Citizens continue to press the issues of escalating rates and poor quality service with local government. In response, the local government officials and the

Citizens Advisory Committee for Cable Television working on their behalf, have endeavored to educate the public about the constraints placed on us by the Cable Act of 1984 in dealing with these issues. We are discovering that our constituents do not accept this explanation and are demanding that local, state, and federal officials do something to bring the cable industry under control.

Century Communications Corporation, like all cable operators doing business in a competition-free environment, has no incentive to be responsive to local government and the concerns of our constituents.

3. PROGRAM EXCLUSIVITY.

Moreover, for multi-channel system providers to be truly competitive, they must have clear access to programming sources, and we support the bill's program exclusivity provision. "Vertical integration" between programmers and cable operators are enhancing the monopolistic characteristics of the cable industry. Owensboro's cable operator frequently complains about programming costs while nationally, vertical investment in the cable programming industry by cable operators continues to grow. There is no effective competition unless all cable operators have equal access to programming and programmers should be legislatively required to make their programming available to all cable operators serving the community on a nondiscriminatory basis.

3. DAMAGE IMMUNITY PROVISION.

If municipalities are to compete in the cable industry or assert their regulatory authority under Senate Bill 12 or other proposed legislation, Congress needs to provide franchising authorities with immunity from monetary liability to cable operators for damages allegedly arising from the franchising authority's efforts to regulate the industry. To date there has been no consensus among courts concerning the application of the First Amendment and other legal standards to actions taken by local franchising authorities. It is unfair to allow cable operators to threaten local governments with the spectra of money damages when the law is unclear. By providing "damages immunity" for cable related suits, Congress would be adopting the same approach already taken under the anti-trust laws with regard to local regulation of cable systems. Local governments would still be subject to injunctive and declatory relief if their actions are determined to violate federal law. The problem is one of perception. Cable operators view themselves as "publishers" as opposed to a regulatory-sensitive common carrier or utility, and feel they are entitled to control all operations of the cable system, including programming. The citizens of Owensboro, like citizens everywhere, are frustrated that they have no input into programming choices made by corporate magnates located out-of-state serving their own needs rather than fulfilling those of citizens in the community who pay for cable service.

Consumers through their local elected officials, must be free of intimidation to challenge cable operators to comply with franchise standards and requirements. A damage immunity provision would reduce litigatory intimidation often exerted on franchise authorities during the grant, renewal, or transfer of cable franchises, and would foster the overall efforts to restore competition to the cable industry.

4. TECHNICAL AND CUSTOMER SERVICE PERFORMANCE STANDARDS UNDER THE CABLE ACT.

Under current cable law, as written and proposed, the FCC has authority to preempt cities from establishing and enforcing technical and performance standards more demanding than the old FCC standards of almost twenty years ago. Municipalities need the ability and authority to require and enforce stricter, more contemporary, consumer-oriented standards. Technical standards are one aspect of customer service. Many people in Owensboro have complained about the quality of the cable signal received in their household. Similar complaints have been made to the Citizens Advisory Committee on Cable Television. They wonder why rates go up when the quality of their service goes down. A technical analysis of the Owensboro cable system recently conducted by Rice, Williams and Associates, revealed that several FCC specifications on signal quality were not being met due to the age of the system and lack of an effective preventive maintenance program. As a result, our consultants recommend that the system be overhauled and upgraded to comply with FCC specifications and meet the future needs of our community. Local authorities need to be able to adopt and enforce technical performance standards which correspond with contemporary cable equipment and consumer needs.

The problem is how do we require and enforce technical upgrading by the cable operator? One alternative is to raise the issue of noncompliance as a legal basis for an administrative determination not to renew the incumbent operator's franchise. This would almost certainly precipitate costly litigation. The other alternative is to ask for these in our RFP (request for franchise proposal) while recognizing that we lack the legislative teeth to require and enforce these standards.

Our current franchise does not require the operator to provide any "performance bond" and provides no mechanism for the enforcement of technical standards and/or repairs. The Federal government simply does not have the resources to monitor compliance in every community and complaints to state or federal regulatory enforcement agencies inevitably result in delays in the investigation and resolution of consumer complaints. The Cable Act should be revised to give local governments the authority to adopt stricter contemporary and performance standards and to provide a mechanism for making them locally enforceable. This will enable Cities like Owensboro to "police" their own franchises without being forced to turn to an indifferent and unreceptive regulatory agency with no knowledge of local issues. Local franchising authorities, who are closest to the consumers, would then be in a position to effectively address inequitable billing practices, unreasonable responses to cable outages, rebates during outages, time-frames for installation and telephone answering services provided by the operator to handle consumer complaints. Since signal quality problems represent a significant proportion of subscriber complaints, local cable operators should provide signal quality that meets contemporary FCC signal standards in tune with the demands of consumers. We urge Congress to adopt legislation allowing franchising authorities to adopt standards that exceed FCC standards.

5. BASIC CABLE SERVICE/"MUST CARRY" REQUIREMENTS.

The courts have recently invalidated the long standing FCC "must-carry" rules on First Amendment grounds. These rules required the cable carriage of local broadcast stations, in order to meet local needs for educational and other public services. Congress should adopt a new clear "must-carry" rule requiring cable operators to carry local television broadcast channels in addition to any cable channels set aside for public, educational, or government access use. In conjunction with this, the definition of "basic" cable service under the existing cable act should be revised to reflect the expanded menu of what current subscribers consider basic cable service. Current and proposed legislation only provides for regulation of cable rates of _basic service_ in the absence of effective competition. The result is that cable operators are realigning their programming packages into service tiers in order to strip "basic cable service" of all programming except over the air broadcast signals. Cable based programming alternatives are reassigned to service tiers presumably beyond the anticipated restoration of regulatory authority. Regulation of basic cable service will be of little or no consequence if "basic" cable services do not include programming sources such as a cable news service, health, arts and entertainment channels, in addition to local broadcasts and access channels.

CONCLUSION

As a result of the Cable Policy Act of 1984 and resulting deregulation, Owensboro, Kentucky, no longer has any realistic leverage over the incumbent cable operator under the terms of the franchise or during the franchise renewal process with respect to those issues most often raised by the general public.

Congress needs to redefine "effective competition", and eliminate arbitrary barriers to what would otherwise be a competitive, market-driven industry. According to the financial analysis conducted by Rice, William and Associates, Century Communications Corporation is in a sound financial position, yet in the absence of effective competition, we are seeing only marginal capital improvements by Century in its Owensboro operations. Cable operators have little incentive to divert any portion of those profits toward the upgrading of cable systems or reduction in basic subscription rates. More often than not, the profits earned by cable operators are being siphoned off and diverted to other commercial endeavors which perpetuate their monopoly over the creation and delivery of programming services. As a result of this unregulated monopoly, cable companies are reaping huge profits at the expense of the consumer. Why should they reinvest a portion of profits in rebuilding our cable system? What are the consequences if they don't? Unfortunately, the consequences are little, if any, because local franchising authorities lack the necessary power to foster competition in the local video marketplace. Owensboro is a microcosm of what is occurring on a national level in the aftermath of deregulation under the Cable Act of 1984. It is time to redress the grievances of consumers who have long been sacrificed on the alter of cable operators. Senate Bill 12 represents a commendable effort to restore to local authorities the right to regulate the rates and practices of cable television operators, but it needs to go further in the areas I have discussed here. It is appropriately entitled the Cable Television Consumer Protection Act of 1991. This Act symbolizes a Congressional commitment to the belief that the rights, interest, and welfare of the public is paramount and supercedent to the rights of cable operators to protect their profits by conducting their business in a monopolistic environment without due regard for the concerns and welfare of those who use their service. With resolve and determination, local, state, and national officials must act during this legislative session to restore the public's confidence in the ability of all elected officials to deal with these issues.

Respectfully submitted,

David C. Adkisson
Mayor, City of Owensboro

Senator EXON. Mayor Adkisson, thank you very much.

Mayor James, we are very pleased to welcome you and hear your testimony now. For your advice, I have already accepted into the record your full written statement. We would appreciate your summarizing at this time, and then we will have some questions.

STATEMENT OF SHARPE JAMES, MAYOR, NEWARK, NJ, ON BEHALF OF NATIONAL LEAGUE OF CITIES AND UNITED STATES CONFERENCE OF MAYORS

Mr. JAMES. Thank you, chairman and Members of the subcommittee. On behalf of the National League of Cities and the United States Conference of Mayors, I thank you for the opportunity to testify today concerning S. 12, the Cable Television Consumer Protection Act of 1991, and on other cable issues of concern to local governments.

As you may know, the Conference represents the more than 800 cities with population exceeding 30,000 residents. The League represents more than 16,000 cities and towns across the Nation.

Mr. Chairman, we appreciate the substantial effort you and other co-sponsors of S. 12 have put into crafting a cable bill that will assist in promoting competition in the cable television industry and alleviating some of the current concerns of cable television subscribers. The bill represents a significant improvement over the provisions of S. 1880, the cable television bill the full committee reported out during the last Congress. The bill is responsive to a number of the concerns that I and more than 700 mayors, city council members, county leaders and other local elected officials identified in a letter to all Members of Congress last week.

I have attached to my written testimony a copy of the letter with all of its attachments, including the official cable reform policies of the League, the Conference, and the National Association of Counties.

I respectfully request that the subcommittee accept the letter along with this testimony as part of the formal record in this hearing.[1] The letter is signed by elected officials from coast to coast and from major cities to small villages. It demonstrates that elected officials are strongly united in urging Congress to enact cable legislation that truly will promote competition and insure that consumers receive quality, affordable cable television service. We stand behind our policy goals.

Moreover, the letter represents a resounding rebuttal to those critics of cable legislation, including James Mooney of the National Cable Television Association, who claim that local governments do not care about cable television issues.

With a few modifications, S. 12 effectively can address many competitive and consumer concerns in the cable television industry. I have briefly identified such modifications in my written testimony. I request that the subcommittee leave the hearing record open so that the League and the Conference can submit more detailed comments at a later date.

We are pleased that sponsors of S. 12 have heard the fears we expressed about the ability of cable operators to undercut the effectiveness of the basic rate provisions in S. 1880 which would have limited local rate regulations to the sub-basic tiers created by many cable operators in past years. Over all, the rate provision represents a significant improvement over the rate provision in S. 1880.

These measures are particularly important to the City of Newark, where my constituents have suffered a 42 percent basic rate increase since 1986, from $12.25 in 1986 to $17.95 today, and another increase is expected in the near future.

The customer service provisions are very responsive to current customer service concerns. The provisions recognize the need for baseline national standards and the need for franchising authority to establish customer service standards responsive to local concern that cannot be addressed by national standards.

Local governments believe the renewal amendments in S. 12 are essential to any cable legislation. More than any other provision in S. 12, the renewal provisions with appropriate modifications have the potential singularly to advance two goals of the Conference and the League for cable reform legislation; that is, promoting competition and insuring that consumers receive quality cable service.

The signal quality provisions alleviate to a significant extent current concerns with inadequate signal quality because the FCC will be required to update its outdated signal quality standards to adjust those standards to the needs of local cable communities.

The damages immunity provision reduces the exposure of municipalities to large damage awards ultimately paid for by taxpayers that might result from the increasing number of First Amendment challenges to the right of local governments to regulate cable systems.

S. 12 takes a comprehensive approach to resolving concerns resulting from horizontal and vertical integration. Local government welcomes these provisions and believes they might be effective in stimulating competition in the cable industry. Local government believes competition that might arise as a result of such provisions is the best solution to current consumer policies.

Until competition materializes, Mr. Chairman, interim regulation will be necessary to protect consumers. I note there are additional provisions in S. 12, which should help alleviate current competitive concerns. I address those provisions in my written testimony.

Mr. Chairman, S. 12, represents a significant step in resolving many of the current problems plaguing cable consumers. With a few modifications, the bill successfully should stimulate competition in the cable industry and secondly resolve current consumer concerns.

In summary, we do want control or ownership of the cable industry. We do want improved services. We do want affordable rates. We do want improved technical staffers. Concerns about limitation of liability, and more importantly, meaningful renewal processes. What we really want is to make cable TV in America better. What we really want is the American dream, a fair competition in the cable industry.

Mr. Chairman and Members of the subcommittee, we thank you for the opportunity to share with you our thoughts on S. 12.

[The statement follows:]

TESTIMONY OF

THE HONORABLE SHARPE JAMES
MAYOR OF THE CITY OF NEWARK, NEW JERSEY
ON BEHALF OF THE NATIONAL LEAGUE OF CITIES
AND THE UNITED STATES CONFERENCE OF MAYORS

BEFORE THE UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
SUBCOMMITTEE ON COMMUNICATIONS

March 14, 1991

Mr. Chairman, Members of the Subcommittee, on behalf of the National League of Cities ("League") and the United States Conference of Mayors ("Conference"), I thank you for the opportunity to testify today concerning S. 12, the "Cable Television Consumer Protection Act of 1991," and on other cable issues of concern to local governments. As you may know, the Conference represents the more than 800 cities with populations exceeding 30,000 residents, and the League represents more than 16,000 cities and towns across the nation.

Mr. Chairman, we appreciate the substantial efforts you and other cosponsors of S. 12 have put into crafting a cable bill that will assist in promoting competition in the cable television industry and in alleviating some of the current concerns of cable television subscribers. The bill represents a significant improvement over S. 1880, the cable television bill the full Committee reported out during the last Congress.

The bill is responsive to a number of the concerns that I and more than 700 mayors, city council members, county leaders and other local elected officials identified in a letter to all Members of Congress last week. I have attached to my Testimony a copy of the letter. See Attachment. I respectfully request that the Subcommittee accept the letter, along with this Testimony, as part of the formal record in this hearing.

The letter, which is signed by elected officials from coast to coast and from major cities to small villages, demonstrates that cable television concerns are national concerns that affect consumers from all walks of life. The letter demonstrates that elected officials are strongly united in urging Congress to enact cable legislation that truly will promote competition and ensure that consumers receive quality, affordable cable television service. Moreover, the letter represents a resounding rebuttal to those critics of cable legislation, including James Mooney of the National Cable Television Association, who claim that local governments do not care about cable television issues. Local governments do care about cable television issues and elected officials have on numerous occasions prior to signing the letter expressed their concerns to Congress about problems plaguing cable consumers.

In the cable legislative proposals accompanying the letter, we identified five primary areas which must form the basis of cable television legislation. Those areas include: (1) provisions to enhance competition, including a competitive franchise renewal process and fair access to programming; (2) more balanced franchise renewal provisions to eliminate what is effectively a perpetual franchise under present law; (3) interim rate regulation to protect consumers until competition emerges, which should be undertaken by local governments within a federal framework; (4) a directive to the Federal Communications Commission ("FCC" or "Commission") to issue baseline consumer protection standards, with local discretion to adopt more stringent standards; and (5) damages immunity for local governments regulating and administering cable franchises.

As discussed below, S. 12 takes a more effective approach to addressing these areas than did S. 1880. Local governments are particularly pleased to see that S. 12 would make it easier to deny renewal of cable television franchises to cable operators who have provided inadequate cable service throughout the franchise term, despite persistent consumer complaints about such service. Moreover, local governments are pleased that S. 12 will broaden the scope of cable service subject to basic rate regulation, and that it recognizes the need for local discretion to enact customer service standards that will address the concerns of local cable consumers.

With a few necessary modifications, S. 12 can effectively address many competitive and consumer concerns in the cable television industry. Mr. Chairman, I request that you leave the record open so that the League and Conference will have the opportunity to submit suggested changes to S. 12. We look forward to working with Members of the Subcommittee and Subcommittee staff in addressing our concerns.

ANALYSIS OF THE PROVISIONS IN S. 12

Regulation of Cable Rates

The driving force for cable legislation has been the dramatic rate increases monopolistic cable operators have imposed on cable subscribers. When I testified before this Subcommittee in November 1989 on the need for cable legislation, I noted that cable operators had increased basic cable rates by 29 percent per subscriber between December 1986 (the month basic rates were deregulated) and October 1988. That increase is

approximately three times the increase in the Consumer Price Index during the same time period. Further, 45 percent of the operators reported increases in excess of 30 percent and almost one-fifth reported increases of more than 50 percent. See General Accounting Office, National Survey of Cable Television Rates and Services (August 1989) In the City of Newark, my constituents have suffered a 42 percent basic rate increase between 1986 and 1990, from $12.25 in 1986 to $17.95 in 1990.

Mr. Chairman, nothing has happened since my 1989 Testimony to lessen the need for rate regulation until true competition in the cable industry materializes. In fact, actions by cable operators since that time only demonstrate the arrogant disregard cable operators have of efforts to regulate the industry. In the past year alone -- a year that cable operators should have been expected to minimize rate increases given the cable bills pending before Congress -- cable rates increased at more than twice the rate of inflation.

Moreover, in an effort to undercut the effectiveness of basic rate provisions in bills pending last session, cable operators began stripping such tiers of popular programming -- thus creating the potential for tiers of regulated basic service to which few subscribers would actually subscribe. In the City of Pittsburgh, for example, the local cable operator reportedly created a new basic service tier at $11.95, which represented a 95-cent discount from the normal $12.90 fee. See Haugsted, A Tale of Tiering, Multichannel News, Jan. 21, 1991, at 1. However, the cable operator had deleted from the tier CNN, Lifetime Television, American Movie Classics, WWOR, TBS, Arts & Entertainment Network and Nickelodeon. Id. In order to continue to get these services, subscribers have to upgrade to an expanded basic tier, which, at $19.15, costs $6.25 more than they had been paying to get the same level of service. Id.

We are pleased the sponsors of S. 12 have heard the fears we expressed about the ability of cable operators to undercut the effectiveness of the basic rate provisions in S. 1880, which would have limited local rate regulation to the sub-basic tiers created by many cable operators in the past year. We applaud the inclusion of the provision in section five of S. 12 that would allow franchising authorities to regulate the tier of service to which 30 percent of all subscribers subscribe if, as often will be the case, less than 30 percent of subscribers to a cable system subscribe only to a stripped-down basic tier.

However, the provision would be more effective if it extended basic rate protection to the tier of cable service to which at least a majority of cable consumers subscribe. We are concerned that while 30 percent of subscribers will be entitled to basic rate protection, cable operators may still have the potential to abuse the other 70 percent of their subscribers, especially if the FCC does not fulfill its obligation under S. 12 to ensure that the rates for non-basic service are "reasonable."

The "effective competition" standard in S. 12 represents a significant improvement over the standard adopted by the FCC, under which 97 percent of all cable systems were rate deregulated. The existing standard, which is currently under review by the Commission, deemed competition to exist if a cable community could receive three broadcast signals. The standard in S. 12 is a more realistic standard because it recognizes that competition exists only where there is another multichannel video programming distributor.

However, although reasonable persons may disagree, the percentages by which S. 12 determines whether a competitor provides effective competition, are too low. Under that standard, a cable operator is deemed subject to effective competition if the competitor's service is available to a majority of the cable community and if 15 percent of the community actually subscribes to such service.

Such a competitor does not provide competition sufficient to cause a cable operator to charge a fair rate. Consumers would be effectively protected if the Subcommittee amended S. 12 to include the "effective competition" standards in S. 211, sponsored by Senator Joseph I. Lieberman, or S. 432, which is sponsored by Senator Howard M. Metzenbaum. Under those bills, a cable operator would be considered subject to "effective competition" only if a competitor's service is available to more than 80 percent of the cable community and if such competitor serves more than 30 percent of the community. For a fuller discussion of the need for such higher percentages, I would be happy at your request to provide you the comments the League, Conference, and other organizations and cities submitted in the FCC's pending "effective competition" proceeding.

Finally, local governments have reservations about a rate regulatory regime which would grant the FCC significant authority to regulate non-basic rates and to oversee local rate regulation. Local franchising authorities should have responsibility for ensuring reasonable rates for all cable services subject to regulation, as proposed in S. 432. Of course, we recognize that in instances of franchising authority abuse, a cable operator should have an appropriate avenue for appeal of local rate decisions. Moreover, local governments should not have to obtain the FCC's approval before regulating rates; the FCC's role should be limited to reviewing challenges by cable operators to local rate decisions. Our concerns are justified by FCC actions in the past, such as enacting an "effective competition" standard that deregulated virtually the entire cable industry and made it possible for cable operators to impose outrageous rate increases.

However, local governments are hopeful the new FCC will obey Congressional mandate and exercise its authority in a manner that ensures consumers receive affordable cable service. We view it as a positive sign that the current FCC has recognized the inadequacy of its existing "effective competition" standard and is willing to consider instituting a more realistic standard -- although its proposed standard is far from adequate and does not eliminate the need for Congress to enact a statutory standard that would not be subject to manipulation by future Commissions.

Additionally, local governments are unclear about what results to expect from the so-called "a la carte" pricing scheme suggested in S. 12. We merely note that no body of information exists to guide us in such uncharted territory.

Overall, we believe the rate provisions represent a significant improvement over the rate provisions in

S. 1880 and we look forward to working with the Subcommittee to address the above lingering concerns.

Customer Service

Cable consumers need protection against inadequate cable service. For example, last year, the City of New York conducted a survey of subscribers in Manhattan, which is served by two cable operators. Approximately 40 percent of the subscribers to one system termed their cable television reception as "poor," "very poor" or "fair." Thirty-five percent of the subscribers to the other cable system described their reception in such terms. With respect to telephone service, a majority of the respondents encountered a busy signal when they last attempted to telephone the cable company. Once connected, approximately one-half of the respondents were put on "hold" for longer than one minute. The problems in New York City are representative of the problems experienced in varying degrees by consumers across the country.

The customer service provisions in section 10 of S. 12 are very responsive to current concerns. The bill requires that cable operators meet baseline standards that ensure that cable subscribers are "fairly served," but does not include provisions preempting local authority to establish customer service standards responsive to local concerns that cannot be addressed by national standards.

Local governments would recommend a few minor amendments to the customer service provisions which would alleviate possible abuses by cable operators of their right of appeal and would clarify an ambiguity that exists in the language.

First, local governments have been subject to numerous lawsuits by cable operators challenging the right of franchising authorities to regulate cable systems. We are fearful that cable operators will bring meritless appeals under the proposed section 632(e) to further their legal harassment of local governments. We recommend deleting the provision. However, in particularly egregious cases, we assume the FCC will have mechanisms at its disposal to provide redress.

Second, under section 10(a) of S. 12, it is clear that S. 12 intends to retain the power franchising authorities currently have to "establish" customer service standards. However, language in section 10(b) of S. 12 could be interpreted to prohibit franchising authorities from establishing customer service standards by ordinance or agreement once S. 12 is enacted. We do not believe that is the intent under this section; the League and Conference, with the Subcommittee's permission, will submit for the record suggested revisions to resolve this ambiguity.

Franchise Renewal

Section 626 of the Cable Communications Policy Act of 1984 ("Cable Act") is intended to balance the interests of cable operators and consumers in the renewal process. In fact, however, the renewal provisions are procedurally and substantively one-sided, and severely limit the ability of local governments to deny renewal to a cable operator providing inferior cable service. Under current law, cable operators do not have an incentive to provide quality cable service because it is extremely difficult to deny renewal. This problem is compounded because most cable operators do not face viable competition in a cable community from another multichannel video programming distributor.

The provisions in S. 12 represent a significant improvement in the status quo and will add balance between the right of subscribers to quality, affordable cable service and the right of a cable operator providing such service to renewal. The amendments to section 626(c) of the Cable Act, which allow franchising authorities to consider for purposes of renewal a cable operator's service "throughout the franchise term," will hold cable operators accountable for poor customer service and franchise violations. The amendments to the "cure" provisions in section 626(d) of the Cable Act will not allow cable operators to escape responsibility for long years of poor service, despite notice that their service is inadequate, by curing the causes of poor service immediately prior to renewal.

Moreover, other amendments, though simply clarifying existing language in the Cable Act renewal provisions, are very significant. Cable operators have implied, in tortured readings of current section 626 language, that franchising authorities do not have the power to take some actions that Congress clearly intended for them under section 626. For example, the deletion of "level" from section 626(c)(1)(B) in the Cable Act will clarify that although franchising authorities cannot consider for purposes of renewal the particular programming a cable operator carries, franchising authorities can consider whether cable operators expanded channel capacity during the franchise term. Some cable operators have misinterpreted "level" in the section to prohibit franchising authorities from considering whether a cable operator expanded channel capacity during the franchise term.

Local governments believe the renewal amendments in S. 12 are essential to any cable legislation. More than any other provisions in S. 12, revisions to the renewal provisions have the potential to singularly advance two goals of the League and the Conference for cable reform legislation -- promoting competition and ensuring that consumers receive quality cable service. The amendments will encourage cable operators wishing to retain their franchises to provide quality service, and will make it easier for franchising authorities to deny renewal and grant the franchise to another cable operator wishing to provide cable service.

However, if the potential for competition through the renewal process is to be fully realized, we urge the Subcommittee to incorporate into S. 12 the competitive renewal provisions in S. 211. Franchising authorities should have the right to give meaningful consideration to other proposals for a franchise subject to renewal and to grant the franchise to a person submitting a competitive proposal if consumers thereby will receive better cable service. Also, it is important that Congress make clear that a state may not prohibit a franchising authority from awarding more than one franchise in its jurisdiction. This concept is recognized in S. 432.

Finally, as noted above, local governments are subject to numerous lawsuits by cable operators seeking to intimidate local franchising authorities who lawfully exercise their regulatory power. Renewal decisions increasingly will be subject to such lawsuits as more franchises near expiration. Despite the fact that the renewal provisions already require franchising authorities to abide by very demanding procedural and substantive requirements that make it difficult to deny renewal, a decision to deny renewal must be supported by a "preponderance of evidence" in order to be upheld by a court. We recommend that the Subcommittee rectify this unfair burden of proof by adopting the "arbitrary and capricious" standard used in S. 211 and S. 432. This standard is often applied in judicial review of many administrative decisions by local governments.

Minimum Signal Quality Standards

Although cable operators have increased cable rates dramatically, most cable subscribers do not believe such increases have resulted in better cable service -- thus making rate increases especially unfair. Of significant concern to cable consumers is signal quality. For example, the local cable operator for the City of Newark reports that 45 percent of the complaints it received last year concerned poor reception. Another 32 percent of its calls concerned the absence of a signal.

The ability of local governments to ensure that consumers receive a quality cable signal has been hampered by FCC limits on the power of local governments to adopt meaningful signal quality standards. This problem is compounded by the refusal of the FCC to update its outdated twenty-year old technical standards for Class I cable channels (those carrying over-the-air broadcast signals) and to adopt any standards at all for other classes of cable channels.

Section 14 in S. 12 would alleviate to some extent current concerns because the FCC would be required to update its outdated technical standards for signal quality and to adjust those standards to the needs of local cable communities. However, the effectiveness of the section is undermined because franchising authorities are prohibited from establishing local standards fully responsive to local consumer concerns.

The concern over the inability of franchising authorities to establish local standards is not resolved by the requirement that the FCC adjust its standards to local conditions. It is questionable whether the FCC will adopt reasonable local standards, given that the current need for action in this area is the result of FCC inaction over the past twenty years. Local cable communities should have the right to adopt technical standards, just as they have the right to adopt other local customer service standards. At a minimum, we recommend that the Subcommittee incorporate into S. 12 the technical standards provisions in S. 211, which would allow franchising authorities pursuant to franchise agreements to establish more stringent standards.

Cable operators argue that local regulation will result in thousands of different standards. If so, that result would not differ from current reality under which cable operators have been virtually free to choose their own standards. Cable systems already operate under various standards which result from the fact that cable systems are not from cookie cutters, but develop in very different local circumstances. Franchising authorities should have the right to ensure that these diverse and different cable systems provide the quality of signal consumers deserve and expect.

Limitation of Liability

Courts have reached conflicting decisions regarding the extent to which franchising authorities can regulate cable systems. Given this legal uncertainty, cable operators increasingly have challenged local cable regulation on various statutory and constitutional grounds. Such lawsuits expose local governments to the possibility of extraordinary monetary judgments, which ultimately are paid for by taxpayers. For instance, Palo Alto and Atherton, California settled for $2 million a lawsuit challenging their constitutional right to collect a 5% franchise fee, despite Cable Act authority to collect such a fee, in order to protect taxpayers from an estimated $1 million appeal and a possible $10-$15 million damage assessment should they lose the appeal.

Section 13 in S. 12 reduces the exposure of local governments to large damage awards by immunizing them from liability in First Amendment lawsuits brought pursuant to the Civil Rights Acts if their regulatory actions are "expressly authorized or required" by the Cable Act. However, we are concerned that a cable operator can circumvent the intended protections by artfully pleading a lawsuit on non-First Amendment grounds. In order to fully protect taxpayers who must ultimately pay damage awards, we recommend that Congress adopt the broad damages immunity language in S. 211, which would grant a franchising authority damages immunity in any federal, state or local claim challenging the regulation of a cable system. A cable operator would still be protected because it would have the right to injunctive or declaratory relief.

Programming and Competition Issues

Only a handful of the cable systems in the country are subject to viable competition from another multichannel video programming distributor. Competitors to cable operators attribute their inability to compete, in significant part, to increasing horizontal concentration and vertical integration in the cable industry. Wireless cable operators, for example, allege that their ability to compete has been undermined by the refusal of programmers to offer them popular programming on fair terms.

S. 12 takes a comprehensive approach to these competitive problems, which local governments welcome and hope will be effective in stimulating competition in the cable industry. Local governments believe competition that might arise as a result of such provisions is the best solution to current consumer problems. Until competition materializes, however, interim regulation will be necessary to protect consumers.

I request that the Subcommittee allow the Conference and League to submit for the record at a later date comments on these competitive provisions and suggestions as to how they might be improved.

Must Carry

We believe the must carry provisions in S. 12 will help protect the future viability of free over-the-air broadcast television. However, cable operators should not be able, as proposed in section 15 of S. 12, to carry noncommercial stations on unused public, educational and governmental access ("PEG") channels. Just as consumers have an interest in receiving broadcast stations, they have an interest in receiving adequate PEG programming. Franchising authorities should have the continued right to protect such PEG interests.

We do not object in principle to the carriage of noncommercial stations on unused PEG channels. However, such use should be conditioned on franchising authority approval and such use should be subject to a termination date to ensure that PEG programing has an outlet should the need arise.

CONCLUSION

S. 12 represents a significant step in resolving many of the current problems plaguing cable consumers. We applaud the efforts of the bill's sponsors in attempting to resolve such problems. With appropriate modifications, S. 12 should successfully stimulate competition in the cable industry and effectively resolve current consumer concerns.

Senator EXON. Mayor, thank you very much. You reference in your remarks a statement that you had signed by several other people. Is that a part of the official testimony that you submitted, or are you submitting that in addition?

Mr. JAMES. We have submitted that in a full package.

Senator EXON. Let me thank you for that.

As I predicted, we are having a whole series of votes, and I am going to have to leave to vote in just a second. Let me ask a question or two if I might.

Mayor James, in your city, is there any competition at all, or coming on line to your knowledge, or are you one of those cities where one cable company has the exclusive franchise?

Mr. JAMES. We are at the mercy of one cable company, Mr. Chairman, and they have an exclusive right in the city. No competition whatsoever.

Senator EXON. In response to the concerns of rate increases, and I think you have made a very good case here, gentlemen, and this is something that concerns us a great deal, I believe the committees as a whole is trying to address this matter reasonably and rationally.

In response to this matter of rate increases, the cable industry has pointed out that the rate increases have been accompanied, of course, by an increase in the number of program services. The cost to the subscriber for each program service has increased only an average of one penny. I do not know where that came from, but that is what they claim.

What is your response to these contentions? Are you saying if that is a factual matter, then what the cable people should be doing is to continue basic service and coverage as was the case 5 years ago, 10 years ago when they signed up? Are you suggesting that maybe one way out of this would be to force the cable monopoly to at least offer an extremely budgeted package that would include at a minimum the services that they originally signed up for at the $12.50 rate, or whatever it was?

Mr. JAMES. I would agree to some extent, Mr. Chairman, because what we are finding out is that the basic cable package ends up with programs that are minor and the programs people really want end up in an upper tier where there is no regulation on them as well, and then we also experienced a problem whereby a franchise is purchased 1 year, held for 1 or 2 years, rolled over at a significant sales price, and then those prices are also passed onto the consumer as well.

In fact we have had a sale for 34 million, there is a proposed $90 million sale. The new incoming operator simply raises the rate based on the fact to secure his debt. I would agree with you also that in the beginning many of the programs which have been removed from the basic tier are now, shall we say, priced out or up whereby they are no longer available to you.

I recall in Hoboken, NJ, when they first subscribed to the cable, they had the Yankees, the baseball team, and then soon they received a notice that they would no longer receive this, unless they paid an additional fee.

Senator EXON. In other words, that basically goes back to the I think the point that you are both making. This is indeed a monopoly, and as a monopoly no one has any say so over what they do or do not do, what programs they show, what charges they make, and that is the fundamental objection that you are raising.

Mr. ADKISSON. That is right, sir, and clearly, in our community, the fact that rates have gone up approximately 40 percent in the last 12 months, there has not been a corresponding increase in the number of programs or services.

Senator EXON. We are having difficulty with the votes on the floor. I would hope at this time, if you gentlemen could remain where you are, I would very much like at this time to recognize Senator Lieberman, who was here.

We called on you earlier, Senator. Would you please present whatever you have to say at this time, and I will be back as soon as I can. Meanwhile, we will keep the meeting going.

STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM CONNECTICUT

Senator LIEBERMAN. Thank you, Mr. Chairman, and I appreciate the understanding of the witnesses who are at the table now, because we are running back and forth from votes.

Mr. Chairman, Members of this committee, on a bipartisan basis, have been extremely effective over the last 2 years in moving us towards reform of the 1984 Cable Act. Under the leadership of this committee, we, as you know, came within the striking distance of passing a good bill last year.

Unfortunately, we missed, but it is my hope this year the benefit of more time we will be able to enact a strong cable consumer protection bill. The need for it is certainly not—in fact, the cable companies continue to give us more reasons to adopt this legislation as time goes by.

Last year, cable prices once again increased more than twice as fast as the rate of inflation, and that is the same rate at which they increased in 1989, the same double of the otherwise rate of inflation.

Last year, we also saw cable companies adopt some new tactics, particularly the institution of new service change fees. I give a local example.

Cox Cable in Hartford, CT, now has four tiers of nonpremium services, and charges consumers $20 each time they want to change tiers. It has been reported there are some companies in the country that have charged as much as $100 for the privilege of changing these service tiers, which the cable companies have established.

Other companies are creating new fees for remote control boxes and for devices that allow a viewer to tape one channel while watching another.

Some break has to be placed on cable's ability to dream up new ways to drain consumers' pocketbooks.

In my written testimony, which I ask be included in the record in full, I have detailed some specific suggestions I have for ways in which I believe S. 12 may be strengthened, particularly the consume protection parts of it.

I want to just take a moment to focus on the issue of why I think we must enact new cable legislation as opposed to waiting for the FCC to finish revising its own definition of effective competition in the cable industry.

To me, the answer is a direct one. We can argue about what the FCC has proposed. We can argue about whether it is strong enough. I happen to think that the good actor clause in that proposed regulation is a great door out of regulation for most cable companies in the country, but there is an inherent and much more fundamental reason why Congress should act, and it is the cable company's offer what is truly a monopoly product, a multi-channel video programming package.

Under the 1984 Cable Act, no one can legally regulate that full package. The FCC is actually prohibited by the 1984 Cable Act, even in the absence of effective competition from reviewing the rates charged for services, other than those that consumers can already get free with an antenna. That is, local broadcast television.

Under the 1984 act, cable companies can deregulate some of their most popular service offerings, such as MTV, CNN, Nickelodeon, or ESPN simply by placing that program in a separate tier from local broadcast services. The FCC has no power to alter this restriction on its own powers through regulation alone, and that is why regulation must be adopted by Congress.

If we rely solely on a regulatory solution by the FCC, and do not reform the 1984 act, we are going to leave cable monopolists a giant loophole that will allow them to continue to abuse consumers with repeated rate increases that far outstrip inflation.

The proof of this flaw in existing law is the rampant retiring that is now going on throughout the cable industry in this county. I can tell you that my own cable system back home in New Haven, CT provides a good illustration. Last year, Storer created what I would call a stripped-down basic tier, which it called its Limited Services Offering, and it contained the broadcast stations, the antenna stations, from Connecticut and New York. It also included Nostalgia, Univision, WTPS, and some public access educational channels.

Its preferred basic service tier adds many of the channels that I think most people buy cable for; namely, MTV, ESPN, Nickelodeon, TNT, Arts and Entertainment, CNN, Lifetime, FNN, and Black Entertainment television.

Not coincidentally, under the 1984 act, Storer in New Haven is found to have no effective competition, only that initial limited service, and not the preferred basic service that has what most of us call cable in it would be subject to rate reviews.

What I want to suggest is that cable is rapidly going at the business of pulling the teeth out of any potential FCC action before, if I may say, FCC has a chance to bite. That is why we have to act this year to pass a cable reform bill that closes the loophole and brings the cable act into line with reality.

Members of the committee, Mr. Chairman, S. 12, in my opinion, does much to accomplish exactly that closing that loophole, and stopping cable companies from evading consumer rate protections for the most popular and unique services.

I personally believe that S. 12 can and should be strengthened, but I must tell you that I am pleased to support it, because, in my opinion, it gets to the heart of the problem, and it offers some real pocketbook protection for consumers. I hope the committee will report it to the full Senate for prompt consideration as soon as possible.

I thank you very much for allowing me to testify on this issue, which is one that I got into in 1984 when I was Attorney General of Connecticut, and I am privileged to have the opportunity to try to continue and complete this cycle with your leadership here in the Congress of the United States in 1981.

STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM CONNECTICUT

In 1984, Congress enacted the Cable Communications Policy Act of 1984 and started the wholesale deregulation of the cable industry The Federal Communications Commission, in 1985, in a decision that I believe could only have been justified by a willful blindness to the economic realities of the cable market, finished the deregulatory job by announcing that three over the air broadcast television signals constituted effective competition of a multichannel cable system. We can now see that those two actions ushered in an era of colossal consumer ripoff. @PARA8 = Since deregulation became fully effective at the end of 1986, cable prices increases have far outpaced inflation. In 1987-88, the rates nationally for the lowest priced basic service increased 29 percent and the rates for the most popular basic service package increased 26 percent. In 1989, according to the General Accounting Office, both the lowest priced and the most popular basic cable packages increased ten percent, twice the rate of inflation. Last year, cable rates increased 13%, more than twice inflation. In Connecticut, since December 1985 the average price of basic cable service increased 52.35%, and the basic service rate for one company — Cablevision of Connecticut — increased 221.9 percent. Inflation over this same period was 20.8%.

In the wake of such large rate increases, one might have expected the number of cable subscribers to drop. In fact, however, the number of cable subscribers nationally rose almost 35%. Over 90% of homes in this country are now passed by cable systems, with over 60% of those homes actually subscribing to cable. In Connecticut, cable now serves 71 percent of the households, up from 65.2% in 1985.

The simultaneous growth in cable prices and subscribership throughout the last half of the 1980s demonstrates what we know intuitively — that cable television is a unique product, largely without adequate competitive substitutes. VCRs and movie theaters may provide some measure of competition to certain payper-view or premium cable services. But to say that the standard cable package, including services such as ESPN, MTV, CNN, Art and Entertainment, and Nickelodeon, competes with over-the-air broadcast television is like saying that airmail competes with the Pony Express.

We have also witnessed a proliferation of devices in addition to monthly rates to take more money from consumers pocketbooks. Among cable's most recent concoction is the "service change fee." Cox Cable in Hartford, for example, now offers four tiers of non-premium services. If a consumer, however, wants to change from one tier to another, they must pay the cable company an additional $20. This is in addition to all the other converter fees, remote control fees, installation fees, and additional set fees that can be piled on. Some brakes must be place on cable's monopoly powers.

Some have suggested that in the wake of the Federal Communications Commission's reassessment of its 1985 effective competition rulemaking, Congress should simply let the FCC pursue a regulatory solution to the problem of rampant cable price increases. But the fact of the matter is that the Cable Communications Policy Act of 1984 prohibits the FCC from adequately protecting consumers through regulatory changes alone. Under the 1984 Cable Act, even if a cable system faces no effective competition, a franchising authority can only scrutinize the rates for signals most consumers already can get free with an antenna — local broadcast TV stations. The FCC cannot, through regulation, give itself, states or franchising authorities the power to regulate the rates for what has come to be known as "enhanced basic" services, including MTV, ESPN, Nickelodeon, CNN, Arts & Entertainment and Discovery. The 1984 Cable Act completely deregulated these services as a matter of federal statutory law.

If we choose the route of relying on FCC regulatory changes without reforming the 1984 Cable Act, we will simply be preserving a loophole that will allow cable monopolists to continue to implement large rate increases for their most popular and unique services without any protections for consumers. As proof, we need only point to the rampant retiering we have seen throughout the cable industry over the last year. My own cable system, Storer — New Haven, provides a good illustration of this. Last year, Storer created a stripped down basic tier, which it called its "Limited Service" offering, which contains broadcast stations from the Connecticut/New York area, Nostalgia, Univision, superstation WTBS, and public access/educational channels. Its "Preferred Basic" service tier adds all the channels people really buy cable for: MTV, ESPN, Nickelodeon, TNT, Arts & Entertainment, Nickelodeon, ESPN, CNN, Lifetime, FNN, and Black Entertainment Television. Not coincidentally, under the 1984 Act, if Storer-New Haven is found to have no effective competition, only its "Limited Service" and not the "Preferred Basic" service would be subject to review.

S. 12 would close this loophole. Under 5.12, local franchising authorities would continue to be able to regulate basic cable service basic cable service. Enhanced basic, including the most popular cable services such as MTV, CNN, ESPN and Nickelodeon, would be regulated by the FCC. Rates for basic and enhanced basic would be required to be reasonable. Only pay-per-view and channels offered on a per channel basis would remain unregulated. This is a substantial step forward over the 1984 Cable Act. I also believe that in requiring that rates for enhanced basic services be "not unreasonable" instead of "not significantly excessive" — an amendment I proposed last fall—S. 12 represents a substantial improvement over 5.1880 which we almost passed last year.

I am also pleased that S. 12 substantially incorporates customer service provisions that I authored last year which will require the FCC to establish minimum nationwide customer service standards, but which permits states and franchising authorities to require cable operators to meet more stringent state or local standards. This, I believe, strikes an appropriate balance between the federal government's interest in providing minimum consumer protection, but still allows the state and local governments to tailor customer service requirements to their local needs.

One fundamental issue I believe the Committee should study further in S. 12 is whether it the regulatory burden should be more dispersed, rather than being concentrated at the FCC. In the area of consumer rate protections, for example, broadcast basic services are regulated by the franchising authorities in the absence of effective competition, but rates for enhanced basic services such as ESPN, CNN, MTV, and Nickelodeon are to be regulated by the FCC. I believe that it is simply unrealistic to expect the FCC to be able to effectively policed enhanced basic rates in the thousands of cable franchises around the country, especially if each cable system creates more than one tier.

To address this issue, last year I proposed to the managers of S. 1880 an amendment that would have allowed the states to regulate enhanced basic services if they so choose. An even better approach, I believe is embodied in S.211. Under S.211, the states, upon written application and certification by the Commission, may regulate rates for all cable services within the state which are not subject to effective competition. The bill permits states to subdelegate its regulatory powers below the statewide level, but requires that if a state does so it must have administrative structures or procedures in place that ensure that uniform standards will be applied in a consistent manner throughout the state.

Under the rate protection provisions of S.211, the FCC would only be responsible for reviewing cable rates in any cable system not subject to effective competition and not subject to state regulation. This proposal shares the responsibility and burden for consumer rate protection between states and the federal government. I believe that this proposal would be much more workable than giving sole jurisdiction over enhanced basic rates to the FCC.

I also urge the Committee to adopt a provision in S.211 that would prohibit a cable operator from charging different rates to different subscribers in the same service area for the same service. This provision would prevent a cable operator from lowering rates in one area of their franchise where they might be subject to competition while continuing to charge high, monopoly rates in areas without competition. In addition to simply being more fair, this provision would deter predatory pricing by a cable operator facing toehold competition from an overbuilder or other alternative multichannel provider.

Finally, I hope the Committee will consider reforming the franchise renewal process so that greater competition can be injected at that stage as well. While it may be most desirable to have multiple franchises in each franchise area, realistically this will not occur for some time. In the meantime, the threat of having to compete at time of renewal based on past and promised performance as a cable operator may help to further spur improvements in customer service and performance of other franchise obligations.

Mr. Chairman, I believe S. 12 contains many of the key elements of a true cable consumer protection bill. I hope the Committee will consider the suggestions I have made here today. I urge the Committee to report this matter to the full Senate swiftly, so that we can enact a reform of the 1984 cable act without further delay.

Senator DANFORTH (presiding). Senator Lieberman, thank you very much. Gentlemen, thank you.

The minority seems to have assumed control of the committee, we are prepared to report the bill out.

OPENING STATEMENT BY SENATOR PACKWOOD

Senator PACKWOOD. Actually, I believe, Senator Danforth, in that case, the Ranking Minority gets to be the Chair, and as I do not like this bill, the hearing is adjourned, and we will have no further hearing.

Senator BURNS. I second.

Senator PACKWOOD. With your permission, I might make an opening statement.

I was listening to some of the earlier opening statements, and I was struck by my experience with television in general and cable television. I was raised in Portland, Oregon. Television did not come there until the summer of 1952, and it came at the time—I cannot remember which party convention came first at the time—but it came at the time of whichever party was holding their convention first in the summer. As people did not have televisions at home, the principal department store put them up in a large covered parking lot. All of the manufacturers had them there, and you could go and watch the convention, but you had to go down to this store's parking lot and watch them there. We were all fascinated by it.

Then pretty soon in a few years we got to watch the Friday night fights with Gillette and all the famous professional fights, and we have seen the sequence go from there. I was struck by what Senator Gore said about we are going to lose some of these sporting events. We have lost professional boxing.

Somehow American civilization has survived. I am amazed that we have made it this far without being able to watch the Friday night fights for nothing. People seem to go to these theaters and pay money to watch them, and children are educated or not educated, but I am not sure it is for lack of being able to see the fights for nothing.

We are told that cable is stealing all the good shows. I do not recall on over-the-air television ever being able to watch the House or the Senate. I do not recall over-the-air television providing me with 24 hours of news that I can watch any place in the country, and almost any place in the world. I do not see that these were stolen in the dark of the night from free television, and swept up into cable television.

Then we talk about all the complaints we get, and all of us have been in politics long enough to be able to tell the difference between instigated and uninstigated mail, and we can even actually tell instigated questions and audiences. You do not have to be in this business very long to sense it.

I have had some very slight mail on this subject, of which about 98 percent—and it is really slight anyway—but 98 percent is instigated either from the cable companies in opposition or from the telephone who wants entry.

Apart from that, in 2 years, I perhaps have had 10 to 15 letters on this subject from average citizens. I know either side can say, well, we will gin up some average citizens to send letters, but it is easy to tell that they are ginned up.

The way most of us stay in touch in politics now is not so much the mail which can be easily instigated, is the questions we get when we go home. Whether you are talking to the labor union, or the Rotary, or the city council, or one of those open town hall meetings, that all have, in 2 years I have had two questions on cable television, so somehow at least in my State people seem satisfied. Most of the are paying significantly less for cable than they pay for their telephone, and they do not seem to complain about the price of the telephone or the price of the cable.

For the life of me, I can see no justification for this bill or any step backward—and I will call it that—into re-regulation.

When I look at where we were 20 years ago on over-the- air and cable just barely an infant 20 years ago, and what we got over the year, and now what we get in terms of diversity—I have only had cable for about 2 years—and I will flip up and down that channel. It is amazing what you can learn about channel placement. I have discovered I can get the three networks on channels 47, 49 and 51. It does not require an advanced degree in mathematics to be able to pick up the Baltimore stations. If you simply look at the program guide and you find out where it is.

You can find things you never found on over-the-air television that you never will find on over-the-air television, and I do not say this critically one way the other, but I think to make the argument that cable has stolen the best of the things from over the air, what I discovered is they are putting on things that never were over the air, so I am going to—in its present form anyway—I am going to oppose this bill. I cannot, at least from my experience in the State of Oregon, that a case has been made to go back to this degree of regulation.

The committee is adjourned. Oh, there is a majority here. I cannot do that.

Senator EXON (presiding). Are there other opening statements? Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Mr. Chairman, thank you for holding this hearing, and thank you, Senator Danforth, for your continued leadership on this issue. I think that this is a very important hearing in terms of consumer impact. In my home State of South Dakota, I have seen the installation rates in Rapid City double overnight where there is a monopoly; or in the town of Millbank where there are two competing systems. Installation is still free. I think that illustrates a fundamental point.

A fundamental principle of this legislation recognizes the need to insure that we have adequate safeguards for cable subscribers. When you have no real competition and no regulation, it is the consumer who suffers.

In my State, the small operators have been very concerned about their subscribers. What concerns me are the reports of large programmers, who discriminate against them driving up their prices. In fact, I have worked closely with some of our REA's and small companies who have not been able to get certain programming for no reason other than the big companies just want to deal with whoever is a bigger customer apparently.

At the same time, we want to insure that the growth explosion in the cable industry continues in terms of service. We need to balance our regulatory needs while considering other means to achieve our desired ends.

One way to accomplish this is to encourage other competing technologies in the video services areas. Clearly we need to address the needs of local broadcasters to be sure that they are not denied access to cable subscribers. I am also very concerned about the need for our Nation to develop an advance communication network. Indeed, I have talked much about the need for fiber optics to be available throughout our country.

In the Science Subcommittee, I am working on getting all of the super computer technology hooked together so that smaller universities, hospitals, smaller businesses can have access by fiber optics. I am glad to see that one cable company, Warner, has wired with fiber optics cable. I think it is a very important step forward. That technology needs to be available in our inner cities and in rural areas.

Mr. President, there are a number of other issues that need further discussion, but I look forward to the testimony of today's witnesses, and hope they can shed some light on this controversy that I hear from my constituents and from my cities, and I do hear it for more than two or three. I do have it brought it up in public listening meetings, spontaneously, I think, about some of the rate increases and some of the service problems.

Thank you, Mr. Chairman.

Senator EXON. Thank you, Senator Pressler. Senator Danforth, opening statement?

OPENING STATEMENT BY SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much. We have been through this bill before. We came very close to getting it passed last year. My hope is that we could report it out at an early date.

Last year, we reported it out of this committee by a vote of 18 to 1, and I can only say that as far as my State is concerned this is indeed a major issue. On Monday, just as an example, I was in Cape Girardeau, MO, and a number of people—ordinary citizens—in Cape Girardeau mentioned the cable television problem. It is a significant issue. It is a major consumer issue, and my hope is that we could act on this quickly this year.

Senator EXON. Thank you, Senator Danforth. Senator Burns.

OPENING STATEMENT BY SENATOR BURNS

Senator BURNS. Thank you, Mr. Chairman. I guess we must preface this with some type of an opening statement. Dick Tracy's mobile, audiovisual wrist watch is here. Ted Turner does not have to be in Washington, D.C. to testify before this committee. He could be out to in Bozeman, MT; the base of the Galatin range of the Rocky Mountains, just south of Bozeman, enjoying the life of a rancher; can do it by a fiber optic network, and his hologram image could be right here today.

Yet, what are we doing? We are sitting here talking about placing shackles on the brightest star in the communications industry during the 1980's—cable television. Folks, we are riding the horse backwards. Instead of talking about re-regulations, a rein in cable rates and improved service, we should be talking about eliminating regulations and fostering competition in this industry.

Our current policies are holding back the communications industry in this country. We need more competition. not less. Let us open our eyes. We just got done fighting a high-tech war with a victory over the fourth largest army in the world.

What was Saddam Hussein's best weapon? It was not the SCUD rockets, but his direct link instantly to every home in America. We are in the information ages, not the dark ages. Technology is changing so rapidly that the term "Beam me up, Scottie," from Star Trek may be no further from reality in the future than personal communications services that you wear on your wrist today.

That is the way it was back in the 1940's when Dick Tracy come out in the funny papers. Just as wagon trails, waterways, railroads, highways, airways, where the engines of economic development during the first two centuries of this Nation, the information ways of the third centuries are keys to our future.

Like nations—Japan—realize this. They are encouraging modernization of their telecommunications infrastructure; the technology of the information age will also develop and be in control by the countries encouraged a steady stream of ideas and innovations in communications, not in countries that construct an array of regulatory obstacles.

Because of the unintended adverse effect it will likely have on technology and programming innovation by imposing yet another layer of stifling government regulation without removing those artificial obstacles which preclude competition from developing, I will oppose S. 12.

This adverse affect will have a long-term negative impact on our national welfare because it will substantially delay the deployment of an advance telecommunications infrastructure, essential to our long-term national prosperity and the quality of life.

There are two fundamental flaws with S. 12. The stifling regulatory environment envisioned in S. 12, cable companies will be discouraged from investing in new and inventive programming and transmission technologies like fiber optics.

The mere threat of such regulatory regime had a negative impact on the cable industry investment in 1990. The cable industry capital expenditures fell by $268 million, or 13 percent from the previous year's level. This decline followed a trend of double digit increases following deregulation in 1984.

Second, S. 12 fails to modify the existing disincentives in the cable act on telephone company investments in broad band technologies like fiber optics, and cable will not be encouraged to launch a competitive effort in the telephone business.

S. 12 does not even attempt to address the prohibition on the telephone company revisions of video programming.

Moreover, S. 12 does not modify the existing treatment of the local franchise requirement, which in effect results in exclusive monopoly license to provide video programming.

Finally, S. 12 does not encourage the cable industry to advanced technological innovations into the local telephone loop through deployment of personal communication services.

Let us put the saddle on the right way and let all of the horses run. Our cable companies, television networks, local television, radio stations, newspapers, telephone companies, can be world class thoroughbreds in this information age. Let us not treat them like Shetland ponies.

Mr. Chairman, I would ask unanimous assent that a statement from the administration opposing S. 12 be included in the record.

Senator EXON. Thank you, Senator Burns. Without objection, the additional material that you have suggested will be made part of the record.

Senator Breaux. No questions at this time.

Senator EXON. We now will return to the questioning then of the witnesses. I had one round with the witnesses, and so I will be glad to recognize in order of appearance here today. I believe the questions next would be from Senator Packwood.

Senator PACKWOOD. I may have some questions. I did not realize they testified.

Senator EXON. They have testified.

Senator PACKWOOD. I want to re-read their testimony so pass me for the moment.

Senator EXON. All right. Next on the list would be Senator Pressler.

Senator PRESSLER. Let me ask you specifically and very briefly what has occurred to cable prices in your town since the time of deregulation?

Mr. ADKISSON. I just had the figures for the last 12 months. We have had two rate increases in Onsboro, KY. The sum total of that is about 40 percent. That is on basic cable service.

Senator PRESSLER. In the past year?

Mr. ADKISSON. In the past 12 months, that is right. From April 1990.

Mr. JAMES. Ours is 42 percent from about $12 to $17.

Senator PRESSLER. In what period of time is that?

Mr. JAMES. From 1984 through now, and also another rate increase is expected.

Senator PRESSLER. How do each of you consider that increase? Is it excessive?

Mr. JAMES. Many complaints from the constituents. I think the only concern is that they knew what the price was going to be and they seemed to have no controls over the rate increases.

Senator PRESSLER. What changes would occur in your cities if this bill were law?

Mr. ADKISSON. In our city, competition would be encouraged, whether it be a telephone company or some other provider come in, there would be competition encouraged, and we feel like that would be a benefit to our citizens.

Mr. JAMES. I think we are encouraged by this bill, greater technical standards by FCC to improve the quality of cable services, and also think about the rate regulation regime you talk about, or at least you are saying to the cable industry that you just cannot roll over prices without a watch dog and that watch dog has posed this legislation to FCC.

Senator PRESSLER. The position of some is that there is no need for regulation because cable television is not a necessary service. There are a number of competing entertainment services. Do you feel that cable television is something people want and is classified as a service, they will pay for it even if it costs more? How do you look upon this? Here you are, two city mayors. There are a number of traditional type services people need to keep life going, but here we are talking about a form of entertainment and information, I would say.

Mr. JAMES. I think Senator Burns answered that when he said communications become almost a necessity in the world in which we live, so we need cable television to communicate with the world and the environment around you. It becomes almost like an essential item, an essential service, and I think that is why we are saying since it has become an essential service for communication, growth, and education, then it should have some regulatory agencies to protect consumer interests.

Mr. ADKISSON. I agree. The telephone was not an essential service at one point. In our community, I believe we have 78 percent cable customers now. I have a letter in my information that I have submitted to you from the Mayor of Prestonsburg, KY, in the mountains.

Their cable is not just a matter of entertainment and information options, it is a matter of reception. They cannot get TV signals from the other side of the mountains so cable has become necessary in our society—more necessary to some in certain geographic areas.

Senator PRESSLER. Let me ask you this. If this bill were law today, you say you would more competition in your city. You would go back to your city council, and what would you do? Would you invite another cable company in, or how would this benefit you? How do you see this bill as benefitting you?

Mr. JAMES. I think it sends a message to the cable operators more than if we might go back and do something overnight to have Multi-Channel come in or another franchise. I think it just sends a message to the cable industry that the Congress is going to look at them, and that they are not a monopoly, they are not a Frankenstein; they cannot do anything they want to do, and I think it will bring about greater concerns and sensitivity on their part.

The absence of S. 12 simply means it is all right to continue what you are doing, and I believe that is the problem where individual constituents are at the mercy of that one cable operator. Once they come in, you cannot get rid of them and you cannot control them.

Senator PRESSLER. Yes, but you not have some of that power now? Could you not, in your city council, if you really felt the cable company is flagrantly increasing prices and flagrantly abusing their contract, do you not have the authority to cancel them and get another one or to take some action against them?

Mr. JAMES. The hardest part of the cable fight is to have municipalities with limited funds to go into court against giants who have unlimited funds and attempt to try to deny a renewal. They can almost bankrupt many of the cities, towns, and villages across this Nation because they have an army of lawyers who can just stay in court and just argue their client's case.

That is why we also talk about the limitations of liability. Some cities and towns cannot fight this industry or stay in court as long as they are willing to stay, so you give up and just pay.

Senator PRESSLER. Is there an issue of the very poor not being able to afford cable, and thus being cut out of our culture? Now I have previously pointed out that it has only been in the past year that we have been able to get cable in our home here on Capitol Hill, and also in Humboldt, SD, where I live, so we were cut out of the cultural revolution. I guess I had about 5 or 6 years of deprivation.

On a serious note, both inner cities and rural areas are frequently not treated on the same level. For example, many of our small cable companies have a hard time getting programming; many of the co-ops have a harder time getting very many channels under the way it is set up. Our inner cities I believe have some of the same problems.

Is there a danger, as cable rates go up more and more, that a percentage of our population is just left out of the whole thing?

Mr. JAMES. Senator, nothing could be further from the truth. We talked about smart missiles. I came out of a Persian conflict. My son was involved with smart missiles. If we do not have this essential items into homes now, into poverty stricken areas who cannot afford it, then certainly we do not have an enlightened and a learned environment.

Of course people in Newark who are poverty stricken are choosing between heating and eating. Now it is between heating, eating, and cable television, which becomes a necessity for this world of technology that we live in, and for this information that we all need.

If we talk about smart missiles, now we need a smart population, smart children, and cable must be made available to them at a reasonable price.

Senator PRESSLER. Mr. Chairman, I may have some additional questions for the record.

Senator INOUYE (presiding). Senator Burns?

Senator BURNS. Thank you, Mr. Chairman. Thank you both for coming. There is probably nobody that has a more honorable job than local government, and I come out of that realm, and that is where I enjoyed politics the most. Your taxpayers can walk into your office and squawk pretty loud. Of course, they have squawking up here, too. We can run and hide every now and again.

Mr. Adkisson, I am interested in knowing do you grant multiple franchises in your city?

Mr. ADKISSON. We have not. We are served by one cable system.

Senator BURNS. How can this bill foster competition if it does not address multiple franchises?

Mr. ADKISSON. Right now the way the affected competition is set up in this bill—in the 1984 act—if you have three TV stations that you receive in your local area, that is considered effective competition, and we do have three TV stations in our area, but we do not feel like that addresses—that is not competition for our cable system.

S. 12 would allow us to have a meaningful renewal process whereas right now we are involved in an exercise that we feel, as I said, is just educating the public on what we cannot do.

Senator BURNS. But it would not allow anybody else to come in there that might have a better service, that the people like better than one company is offering. Is that correct?

Mr. ADKISSON. It would create a better competitive environment. If nothing else, it addresses the whole notion of exclusive programming rights, and so another competitor could come in and offer that.

Right now, for example, the City of Owensboro has considered one alternative, and that would be to get into the cable business. We are not sure that is cost-effective. We have not done an analysis of that.

A bigger problem that we run into before we get to the cost-effectiveness issue is whether or not we could get rights to certain programming.

Regardless of whether or not another cable operator wanted to come in and compete with our present cable operator, we have limitations on municipal systems right now because of programming exclusivity.

Senator BURNS. The direction I am coming from I do not want to see this cable industry re-regulated. There is no doubt in my mind that the 1984 act that turned an industry—and rates—my if rates went from $12 to $21, but my access is where

I was getting 18 channels or 13 channels and now I am getting 100, it has offered a myriad or a variety of programming that we have never had in Montana before and probably you have not had in Kentucky.

Under this bill, had we been operating under this bill, I will guarantee you the investment in programming and in equipment, in order to get that signal to that home, I will guarantee you that they would still be getting their 13 channels.

This does not address it at all because you do not allow any other competition in there, somebody else that offers something better.

I would like to applaud the cable industry because I do not think they have taken advantage of consumers. They have grown so fast that, yes, maybe there have been some abuses along the line, but those abuses are being addressed. The services that we are getting, right now, they are offering access—community access.

They are offering an outlet for the pre-over-the-air broadcast, and that is another industry that has to be protected. I see nothing in this bill that addresses, that once you make up the mind as a city councilman or as a mayor, once you said, "This is a man that we are going to do business with", that is it. There is no competition.

There is also no threat to force the cable company that you have in there now to get better, and that is what I would like to see done. That is the reason I think the deregulation of this industry was a tremendous boom to the communications era. We would not have had a half today had this industry not been turned loose and let the creative juices flow.

I just do not think it addresses the—Would you oppose an amendment by Congress to eliminate the option, which cities now have in the 1984 Cable Act to grant an exclusive, monopolized franchise? If so, why?

Mr. JAMES. Preventing more than one?

Senator BURNS. Yes.

Mr. JAMES. Again, we want the effort to open it up to have more operators, more competition, and I believe that your goals would be reached more with more competition, more coming in as opposed to having that singular person. I think they have made great strides, but I think you can have greater stride if there was competition knocking on the door.

What we have is that the fiber optic option that we talked about becomes the carrot that they dangle in front of you near renewal time. They have been bad for 6, 7, 8 years. When you want service, you call, you get a busy telephone number, but now when the contract runs out, they dangle all the good carrots out there, so now they have been good for 6 months but bad for 18 years.

I would just like to see that more competition would keep them good for a whole period of time as opposed to just near the time for renewal.

Senator BURNS. I am going to act and think like a lawyer here. I rest my case.

Senator INOUYE. Thank you.

Senator Packwood.

Senator PACKWOOD. Mayor Adkisson, how many channels does your cable system have?

Mr. ADKISSON. I believe, Senator, 44.

Senator PACKWOOD. And you got it in 1971. You are under a 20-year franchise now.

Mr. ADKISSON. That is right. Yes, sir.

Senator PACKWOOD. How many channels did it have in 1971?

Mr. ADKISSON. I am not sure.

Senator PACKWOOD. Substantially less?

Mr. ADKISSON. A limited number. Yes.

Senator PACKWOOD. Substantially less than 44.

Mr. ADKISSON. Right.

Senator PACKWOOD. I will take a guess, probably 10 or 12. I am just looking back those years.

Mr. ADKISSON. I think that would be in the range.

Senator PACKWOOD. You indicated that your rates have gone up, between April and March of this year, 40 percent. It is now $20.95 for basic tier, I assume?

Mr. ADKISSON. That is right.

Senator PACKWOOD. Then you have Exhibit A here, Ashland Bowling Green, and the increase in the basic fee from 1986 to 1989, for 11 cities in Kentucky.

Mr. ADKISSON. Yes.

Senator PACKWOOD. What are you trying to show with that chart?

Mr. ADKISSON. That there have been dramatic increases. Now most of the increases—and I received that information just the other day—the increases have been more dramatic for most communities since 1989.

Senator PACKWOOD. Is the point of it to show that it has gone up significantly faster than the rate of inflation, and therefore there is something wrong?

Mr. ADKISSON. Yes. Yes, that is part of the evidence we presented. Yes.

Senator PACKWOOD. Would the reverse of that argument be true then, if over the last 20 years cable rates have gone up less than the rate of inflation, that would be an argument not to regulate?

Mr. ADKISSON. I am sure there are several dimensions to that argument. I am not sure the reverse is true.

Senator PACKWOOD. Why is what you are suggesting true if the reverse is not true?

Mr. ADKISSON. I think the point of the chart that we have included is that rates have gone up for basic service, not for going from 10 to 44 channels. We are talking about basic service has gone up that dramatically.

Senator PACKWOOD. No, I understand that. But if you are using the argument that there has been an increase greater than the rate of inflation since 1986, and therefore it justifies re-regulation—forget the number of channels; you have also got lots more channels than you use to have—why is the converse then not true, if over the period of 15 or 20 years, however long you have had it, it has gone up less than the rate of inflation, and you have gotten more channels to boot, why is that not an argument against re- regulation?

Mr. ADKISSON. There are several aspects to this bill that are advantageous for re-regulation, not the list of which is service and various technical standards.

The increases we are noting is not for the length of our franchise, which is 20 years, the increases we are noting are increases that have happened in a short span since 1984 when deregulation took place.

Senator PACKWOOD. Yes, I understand that, and that is because the rates were not allowed to go up much at all prior to deregulation, and they were kept artificially low, were they not?

Mr. ADKISSON. I could not speak to that.

Senator PACKWOOD. What was the basic rate in 1971 in your town?

Mr. ADKISSON. I am not sure. I was not paying a cable bill then.

Senator PACKWOOD. Let me ask Mayor James if I can, how many channels in Newark now?

Mr. JAMES. About 44.

Senator PACKWOOD. How long has Newark had cable?

Mr. JAMES. Since about 1982 or 1983, recent.

Senator PACKWOOD. You are more typical of the normal urban situation where it came much later to the big towns than it came to the small towns?

Mr. JAMES. That is correct. All the problems of installation on urban city, yes.

Senator PACKWOOD. When it came, you probably had a lot more channels when it came in then than did Owensboro because it came a lot earlier.

Mr. JAMES. Yes, because of being in the metropolitan area as well.

Senator PACKWOOD. I have no other questions, Mr. Chairman. Thank you.

Senator INOUYE. Thank you.

Senator Breaux?

Senator BREAUX. I will try to be very brief. Since we have five panels, we may be here until midnight at the rate we are going.

Mayor Adkisson, I talked to Wendell Ford on the floor, and he said that he knew you were going to do a good job, and was not going to be able to be here because you had gotten all of your training with him at an early age. He was very complimentary of you being with us.

Mr. ADKISSON. Thank you.

Senator BREAUX. Can you give me an idea of how many subscribers you had say 4 years ago versus how many subscribers you have in Owensboro today?

Mr. ADKISSON. I do not have the information for 4 years ago. I would be glad to submit that to you. We have about 18,000 right now.

Senator BREAUX. Is that less than you had 4 years ago, or would you say it is more than you had 4 years ago?

Mr. ADKISSON. I believe it is about even.

Senator BREAUX. Mayor James, can you give me a kind of comparison?

Mr. JAMES. We have about 35,000. It continues to grow. The city is completely wired now so it is only a question of economics, do you want to buy into the system?

Senator BREAUX. One of the points I am interested in, it would seem that if the people had felt out there in consumer land that the prices were increasing faster than they thought were acceptable, they would be either turning off the system or not getting new subscribers, but apparently you have had a fairly large increase in the number of people who are willing to pay for the services. It would seem then if they were unhappy with the price increases, they just would not buy the services.

Mr. JAMES. Two things I do know. Number one, I think we have a lot of difficulty in collection. Again, people consider it essential so they get it, and then we have complaints from the company of trying to collect because people will not pay their monthly bills, but they have it nonetheless.

Also I think what we witnessed has increased pirating attempts, and that has also been an expense to the industry where they have tried to stop those from pirating, just go into the back yard and hooking their own wires up. As the price goes up, you cannot get at people doing other things which are illegal, but they are trying to survive and they are trying to stay informed of what is going on.

Senator BREAUX. The cable companies will probably allude to their statistical information that says, that while it may be a 40-something percent increase over the years since we have deregulated the cable systems, that per service or per new channel that you can get on the system, it reflects about from 47 cent per service to a 48 cent a month charge after the 4-year period, that you really have not had a very large increase at all, you have just gotten a lot more services for those prices.

Was that ever relayed back to your constituents who complain about the price increase? Do they not accept that? How did they react to that?

Mr. ADKISSON. I think if I tried to address a constituent complaint that way, they would remind me that they cannot afford all of the channels today. We are talking about basic service having gone up by the percentage I have noted.

You have to assume by that argument, I think, that someone could afford it all X number of years ago, and can afford it all now.

Senator BREAUX. The final question is the legislation sets out a set of guidelines that the FCC would in essence allow the local franchise authorities to use and to follow, to in fact go about a rate regulation procedure. Is that satisfactory that the cities and local communities would have to follow guidelines set out by the FCC?

Mr. JAMES. We think it is a step in the right direction if FCC has the time, the interest, and administrative bureaucracy to actually become involved in that, and that is why I think there has always been the outright request that the local authorities become involved in rate regulation. The local authorities become involved, and the question of technical standards, and then if there is an appeal, you can go to the FCC.

Of course, there are statements that mayors want to control the cable; own it, and abuse it, and I am sure there have been some abuses. Basically, we feel that we are the ones the citizens call; we are the ones who know the problem, and if you had the local authority involved in that, the FCC could be the watch dog, the appeal person, but not, shall we say, at the federal level where you will be able to address the local problems of constituents. You cannot regulate local problems at the federal level.

Senator BREAUX. Mayor Adkisson, do you have any thoughts on that system in the bill?

Mr. ADKISSON. I would agree with what he has said, and that the FCC has a role to play there, but the local community needs to be able to customize standards to their local situation.

Senator BREAUX. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Danforth.

Senator DANFORTH. Gentlemen, the cable company in each of your communities is a monopoly, is it not?

Mr. ADKISSON. That is correct.

Senator DANFORTH. And you do not have any power to regulate the monopoly, right?

Mr. ADKISSON. Not on the basic areas of concern to citizens, no.

Senator DANFORTH. The theory of deregulation in the various industries that we deregulated was that competition is better than regulation, and that competition would be a substitute for regulation, would do the job of keeping services at a high quality and prices within reason, but the nature of the cable industry in individual communities is that of an unregulated monopoly. Right?

Mr. JAMES. That is correct, Senator.

Senator DANFORTH. When I go back to my State, there is an uproar about cable services. Ordinary people are just in a furor, outraged by it. They believe that they are being gouged by the cable companies, and they express that to me.

I am not surprised to hear people express the belief that an unregulated monopoly is abusive. You are very close to the people in your communities. Nobody is closer than the mayor. Do you get a lot of complaints about the cable company, or are people pretty relaxed about the whole thing?

Mr. JAMES. When they had problems, they first tried to call the cable company directly, and I think everyone experienced the same thing—it is busy, and on the weekend, do not call. So then they called the elected officials, and you are powerless to do or say anything.

I think that is our real point, that we are not trying to control or take over, we want an outlet where there is competition, where at least they feel they are responsive to someone. We have absolutely no say in what they do, and they know that.

If John Doe citizen is angry; you can get frustrated, the bottom line is you give it up or keep it. In this world today, you cannot give it up because we need it for communication purposes.

Senator DANFORTH. I have heard the same thing in Jefferson City, when I met with the City Council of Jefferson City. When people have complaints about the cable company, they get on the telephone, and they call the cable company, and nobody answers the telephone. In Newark, NJ, you get the same thing?

Mr. JAMES. Busy.

Senator DANFORTH. My leading example of a company, a business that is running totally out of control and has no concern at all for the constituents, no concern at all for the customer, other than to gouge them, is a company that does not even answer the telephone. And that is the situation in Newark, NJ? You cannot even get to them on the phone?

Mr. JAMES. That is correct.

Senator DANFORTH. Same with Jefferson City. How about you, Mayor Adkisson? Do you get comments from constituents about the cable company?

Mr. ADKISSON. I do. I have gotten numerous comments with in the last few weeks. Of course, we are in a situation of franchise renewal and so there is a heightened awareness right now of cable. But there is also a heightened frustration because we cannot do anything about it.

A gentleman sent me this yesterday because he heard that I was coming here. A man on 11th Street in Owensboro, I do not know the gentleman. He is not a lobbyist with the telephone company or any of that. But he went up and down the street and got 67 signatures on a petition, did not know exactly what could be done with it. He sent a copy of Senator Ford and a copy to me. But that is the kind of concern that is out there. And yes, it is very real and it is not prompted by special interests.

Senator DANFORTH. And people express concern about the price. Do they also express concern about the quality of service?

Mr. ADKISSON. Yes. Yes.

Senator DANFORTH. All right. Is it surprising to you that an unregulated monopoly would be less than responsive to the public?

Mr. ADKISSON. No, that is not surprising. It would seem to follow.

Senator DANFORTH. It follows as the night the day, does it not?

Mr. ADKISSON. Yes. That is right.

Senator DANFORTH. I mean, there is something un-American about unregulated monopolies. I think we have recognized that throughout this century, that either we are going to have regulation or we are going to have competition. But we are not going to have neither. There is no competition for a cable company if people want cable. They might want to do something else with their lives.

I mean, the cable companies say that the fish bowl is competition because you can watch the fish bowl. Or the Parcheesi board is competition because you can play Parcheesi. But if you want to watch television as a practical matter, in Owensboro, KY, you watch the cable, right?

Mr. ADKISSON. That is right. That is right.

Senator DANFORTH. And in Newark, NJ, as a practical matter, you watch the cable. And there is only one provider, right?

Mr. ADKISSON. That is correct.

Senator DANFORTH. In each of your communities, there are not two. This legislation says if there are two multi-channel providers, then you do not get to regulate. That would seem reasonable to me, that we prefer regulation or we prefer competition rather, to regulation.

Well, I must say that the people of my State are extremely angry about this situation and believe that businesses are really abuses them, and as you say, Mayor James, do not even answer the telephone.

Tell me, mayors congregate, do they not? I mean, you go to meetings of mayors, right?

Mr. ADKISSON. We are occasionally seen with other mayors, yes.

Senator DANFORTH. Yeah. Do you, when you meet with other mayors, does anybody ever mention the cable problem?

Mr. JAMES. We have just had the National League of Cities Meeting U.S. Conference of Mayors, and after we talk about drugs and national security, and we talk about homelessness and many social problems, interesting enough, the cable television has always been a subject of national concern because it is the little people, the senior citizens, where as we might look at $10, $12 as being insignificant.

But think of our senior citizens on fixed income. And whatever happens in that cable industry is a tremendous shift for those on fixed income. And television is the life to senior citizens. And the complaints are coming in. But it is frustration.

I was going to say to Senator Packwood, the reason people do not complain because, who is going to listen. You have to have someone to listen if you complain to. And in Newark, NJ, they do not have to listen to you because we have no say in what they do.

Senator DANFORTH. Senator Breaux said, well, senior citizens or other people might call up and just disconnect their service if they are not satisfied. Do you know what, say, an 85-year-old person who lives alone in an apartment in Newark, New Jersey is expected to do without the television? Would it, in your opinion, Mayor James, significantly affect the quality of life of that individual if they just said, well, I do not want the cable service anymore, I am going to do something else, maybe join a bowling league or go roller skating or something? I mean, would that not affect the quality of life of somebody in the later years of their life if the television were turned off?

Mr. JAMES. Very significant. And even the young, and even the wheelchaired, the handicapped. I think—you see, I agree with Senator Breaux. It is a necessity. It is communication. It is with the smart missiles and the whole era of technology.

And that is why it needs to be in the household and we need to regulate it. And we are not saying, take over. We are saying, create the competition, what has made America great.

Senator DANFORTH. If you were in a town meeting with your constituents and you took the position that there is really no problem here and everybody should be grateful for the wonderful service they are getting from the cable companies, what would be the reaction of the people of Newark to such a statement? They would boot you out of office, would they not?

Mr. JAMES. I think I would be tarred and feathered and I would not be in office too long.

Senator DANFORTH. How about you, Mayor Adkisson?

Mr. ADKISSON. I would look for the nearest door. The reaction would be very strong because people are upset. And they are upset about, not only the rates, but there is no exercise of justifying the rates. You receive your bill and it is up $3.

And the argument that, well, if you do not like it you can turn it off, you can disconnect. Well, you could use the same argument for the telephone. If you cannot afford it, disconnect. You do not really need a telephone to breathe in this life.

And the same argument could be used for electricity for that matter.

Senator DANFORTH. And the gas company, right? You could just say, turn off the gas.

Senator INOUYE. Thank you both very much.

Senator Gore.

Senator GORE. Mr. Chairman, I will be brief because many of the questions I was going to ask have been asked. But both of these mayors are good friends and I want to welcome them here. And Mayor Adkisson is a neighbor just to the north of my part of Tennessee. And it is especially good to see you here.

There are a lot of good cable operators and as one who has pushed this legislation, I want to stipulate that. But the basic problem has been elucidated here. And that is, no business in America should have neither competition nor regulation.

And I think you two have been very effective in making that point. I assume you have already been asked to state for the record that the concerns you are expressing here are by no means unique to your cities. But they are virtually ubiquitous and represent the feelings of your colleagues all across the country.

I will provide for the record, Mr. Chairman, some resolutions from city councils in Tennessee. Just as one representative example, Hamilton County, which is the country where Chattanooga, Tennessee is located says, "Whereas, because of consumer complaints of price gouging, poor service, and unfair marketing, Congress has considered additional legislation to remedy these problems. And whereas presently proposed legislation, now before the U.S. Senate would partially re-regulate the industry, without allowing full and free access to the cable market by alternative competitors, we hereby request, so forth, that the Senate pass this legislation."

As I mentioned, most of my questions have been covered. We have a long agenda of witnesses so I will end at that point.

Thank you both for coming.

Senator INOUYE. Thank you very much.

Senator PACKWOOD. Could I ask one more question of Mayor James, if I might?

Senator INOUYE. Please do.

Senator PACKWOOD. Mayor, you got television in 1980, cable in 1982 or thereabouts.

Mr. JAMES. Around, yes, Senator.

Senator PACKWOOD. And I assume it was over the air before that?

Mr. JAMES. I am sorry. I did not hear the last.

Senator PACKWOOD. Before 1982, I assume your television was just over the air.

Mr. JAMES. That is correct.

Senator PACKWOOD. Most of which, I assume was out of New York.

Mr. JAMES. That is correct.

Senator PACKWOOD. At that stage, how many over the air channels did you have? Do you know?

Mr. JAMES. About 10, 11.

Senator PACKWOOD. 10 or 11?

Mr. JAMES. Right.

Senator PACKWOOD. Now, the NAB, the National Association of Broadcasters, if they testify will say, because they have a complaint with television, about cable taking their signals and not paying them. And I think they will use the figure that someplace between 65 and 70 percent of what people watch on cable television is what they could watch over the air. Cable is taking these signals and running them. So that over the air television is providing the bulk of the programming for cable.

If your people could watch 65 to 70 percent of what they wanted without cable television, you used the word in response to Senator's Breaux's question, that even though the prices go up, they buy cable because it is essential.

What does cable provide that is essential that your people have to have that they cannot get over the air?

Mr. JAMES. I think the opportunity to view news breaking events that will come up on a cable network, as certainly during the Persian Gulf was more evidence of the importance of cable. It gives them the opportunity that when any event comes up that they need to watch, they feel a need to watch, will be available to them.

And I think what we are finding out, Senator, and I do not think we made it too clear, as people began to identify with local programming that was free at one time, many of those programs have moved from that free tier, to the cable pay extra tier. And so, eventually, if you want to be prepared to be abreast of what is happening in the world, you need both the regular channels that are free, and also what is available on cable.

Senator PACKWOOD. So what you are saying then, this is my last question, cable is providing something that over the air cannot and apparently does not provide?

Mr. JAMES. That is correct. I agree in the importance of cable industry, yes, sir.

Senator PACKWOOD. Thank you, Mr. Chairman.

Mr. JAMES. Thank you, Mr. Chairman and members of the committee.

Senator INOUYE. I would like to ask a couple of questions. I am sorry I was not here to listen to your statement.

This committee has been advised that there are over 8,000 cities with cable and of those 8,000-plus cities, 53 have two cable systems.

We further learn that most cities are reluctant to have more than one franchise. Would you be in favor of legislation that would encourage cities to provide more than one franchise?

Mr. JAMES. Mr. Chairman, we would welcome more than one franchise but not to have it mandatory because then you might have a situation where it is not fiscally viable to have two or even three in a community. But we would welcome the opportunity that there should, or could be more than one. But not where it is mandatory because then you would have a cable company coming to a municipality and saying, we are coming in. You have to have us whether needed or not.

And then, of course, it could involve number one, costly litigation. But more important, maybe that community could not sustain two.

Senator INOUYE. That is why I used the word encouraged. Do you support elimination of the restriction on telephone company ownership of cable systems?

Mr. JAMES. We believe that would be another form of open competition. But we would caution this distinguished committee that the telephone company should be viewed with the same safeguards and regulations necessary that we are asking now for the present cable operators. And that again, we do not want to go from one monopoly to another.

So I think the important question is, yes, that would afford a greater competition but again, it would require safeguards and regulations to insure that, be it the telephone company or the present cable operators, that no one would act as a monopoly. And that the consumer concerns that we made mention of today would still be protected.

Senator INOUYE. Mayor Adkisson, do you agree?

Mr. ADKISSON. Yes, I do. Yes, I do.

Senator INOUYE. Gentlemen, I thank you on behalf of the committee, and I will now call upon the next panel.

Mr. JAMES. Thank you very much, gentlemen.

Mr. ADKISSON. Thank you.

Senator INOUYE. Our next panel consists of the president of the National Cable Television Association, Mr. James P. Mooney; and the chairman and chief executive officer of the Cox Enterprises, Incorporated of Atlanta, Mr. James Kennedy; and the president and chairman of the Board, Turner Broadcasting System of Atlanta, GA, Mr. R. E. "Ted" Turner. Gentlemen, welcome and may I first call on Mr. Mooney.

STATEMENT OF JAMES P. MOONEY, PRESIDENT, NATIONAL CABLE TELEVISION ASSN

Mr. MOONEY. Thank you sir. Mr. Chairman, I want to thank you and other members of the committee for your many courtesies to us, not only in preparing for this hearing, but throughout your consideration of these issues.

I have submitted an extensive prepared statement for your record and will just take a few minutes now to mention some points we would like to highlight.

I should say up front that we must oppose S. 12. This should not be taken to imply either disrespect for the bill's authors or for that matter, any misapprehension as to the likelihood that cable regulatory policy will undergo significant adjustment in the near future.

Both the Congress and the FCC appear ready to reach the conclusion that the existing rules, particularly as they apply to cable rates, need alteration. And we full expect that by late spring, the commission will have acted to make major modification in its rules which govern regulation of cable rates by local governments.

And our position is simply that we urged the Congress to wait to see what the expert agency is going to do and see if the FCC can resolve the consumer issues.

I will be happy to answer questions on S. 12, but in the few minutes I have now, I would like to stress three trends, which we hope you will keep in mind as you consider this legislation.

First, what the cable subscriber gets today is very much different from what he or she got 6 years ago. In 1984, besides fewer channels, there was very little made for cable programming offered on basic service.

Yet, if you are a cable subscriber today and tune in tonight, the top 10 cable nets will offer 17 hours of original cable fare between 7:00 p.m. and 11:00. This represents extremely rapid program development and has cost us a great deal of money.

Yet the public certainly seems to approve. The proportion of U.S. TV households served by cable has gone from 41 percent in 1984 to nearly 60 percent today, and the viewing share of cable networks rises each quarter.

Second, we are rapidly approaching a new watershed in the development of our technology. Almost all of our companies are now considering or actually using fiber optics in the trunking and feeder portions of their plant, and as channel compression technology comes on-line, a new digital compression system was announced just 3 days ago, you are going to see a break through in cable channel capacity.

The Time-Warner announcement last week that they will use fiber to rebuild their Queens system to 150 channels, and have 10,000 subscribers hooked up by the end of this year, is merely a harbinger of the kind of change we expect to see in our industry over the next several years.

This too will cost quite a bit of money, but we think if we are to remain competitive against other new technologies, we have to do it.

Third, we are working hard to solve our customer service problems. Last year, NCTA developed industry-wide customer service standards, and we are urging our companies to come into compliance with them by this July.

These are not easy standards to meet and some of our companies will not make by July. But we understand the problem, and we are trying to resolve it as quickly as possible. Improvement in this area too is expensive. Our labor costs are rising very rapidly. But again, we understand it is something we have to do.

The point I intend to draw from this, Mr. Chairman, is that in a period when the public demands more and better programming, constantly improving technology and near flawless customer service is very difficult to do all of that and every year, keep your retail prices within the CPI.

I do not say all cable rate increases are attributable to these kinds of increased quality costs. In fact, I am sure that before the day is over, members of the committee will have brought to my attention some situations harder to justify.

But in overall industry terms, we hope you will consider that we are still developing this medium, this technology and this business, and exclusive emphasis on restraining rates will probably hamper continued positive development in a rather serious way.

We know rate increases upset people, but we think cable is an increasingly good value. By way of comparison, the average cable customer gets 34 channels of basic cable service for a monthly price which is a couple of dollars less than you would pay for one copy of Danielle Steele's new heart throb novel, which at $22 tops the New York Times best seller list this week. We think the cable subscriber gets a better deal.

Thank you, Mr. Chairman. I will be happy to answer questions.

[The statement and questions and answers follow:]

STATEMENT OF JAMES P. MOONEY
PRESIDENT AND CHIEF EXECUTIVE OFFICER
NATIONAL CABLE TELEVISION ASSOCIATION

I. INTRODUCTION

Mr. Chairman and members of the Committee, my name is James P. Mooney. I am President and Chief Executive Officer of the National Cable Television Association. NCTA represents several thousand cable systems which serve more than 90 percent of the 55 million cable households in the United States; it also represents 58 cable programming services engaged in creating and distributing a broad range of programs for cable television. We appreciate this opportunity to appear before you today to discuss proposed cable legislation.

NCTA opposes S. 12 as written and urges the Committee not to consider taking up cable legislation until after the Federal Communications Commission concludes its effective competition proceeding and Senators have had a chance to gauge its impact.

In 1984, the Congress passed landmark legislation -- the Cable Communications Policy Act of 1984 — to improve the quality of television, expand the availability of programming, and help end the dominance of American television by just three broadcast networks. The cable industry has fulfilled Congress's expectations and has offered consumers with important new choices in television entertainment. Not only has the cable industry developed an alternative medium for delivering television programming to American homes via coaxial and fiber optic cable, it has produced dozens of new programming networks. It would be a mistake for

Congress to choke off further investment in plant and programming by imposing excessive new regulations — especially during a recession.

The impetus for S. 12 and its antecedent, S. 1880, came several years ago in the form of constituent complaints about a few cable operators who charged excessive rates and delivered inferior customer service. Since then, the cable industry has acted to correct service problems by promulgating new customer service standards which should be implemented by July of this year. Furthermore, the FCC is addressing the issue of rates by using its existing authority under the 1984 Cable Act to redefine effective competition. Cable operators have heeded the warnings from members of this Committee and have taken steps to improve their service and remedy any deficiencies they have found. Where problems continue to exist, they are the exception, not the rule.

II. THE FCC IS ALREADY EXTENDING REGULATION OF CABLE RATES IN ITS EFFECTIVE COMPETITION PROCEEDING

Under the Cable Act of 1984, the Federal Communications Commission is required to establish rules defining the circumstances under which a cable system is subject to "effective competition." The Act further specifies that where there is "effective competition," local franchising authorities may not regulate cable rates. In 1985, the Commission determined that a system was subject to effective competition whenever three or more unduplicated, over-the-air broadcast signals were available in the cable community. In 1990, after an initial review of this finding, the FCC tentatively concluded that the three-signal standard no longer represented an appropriate measure of effective competition. However, it did not propose any specific modification of the three-signal standard. Instead, the Commission deferred to the Congress, which was considering various bills to revise the statutory framework for regulating cable television.

In October 1990, Congress adjourned without passing any cable legislation. Consequently, the Commission decided to move forward with its effective competition proceeding in order to redefine when and how local officials could regulate cable rates. Specifically, in a Further Notice of Proposed Rulemaking released on December 31, 1990, the FCC proposed three new tests for determining whether a system is subject to effective competition: a broadcast signal standard, a multichannel competitor test, and a "behavioral" standard. In addition, the Commission proposed supplemental rules aimed at constraining local officials in situations where rate regulation is permissible.

The FCC's proposals in the effective competition proceeding were influenced by its recent inquiry, required by the Cable Act, into the effects that the Cable Act and rate deregulation have had on the video marketplace. That inquiry produced a Report to Congress in 1990 wherein the Commission confirmed that rate deregulation was having the beneficial effects intended by Congress, e.g., increased investment in technology and programming and a corresponding nationwide increase in the number of cable subscribers. Moreover, the FCC concluded that, in light of these investments, the rate increases which followed deregulation were neither excessive nor a reflection of undue market power. Indeed, rate increases were anticipated after passage of the Cable Act as part of the normal process of upgrading cable's technology, channel capacity, and programming. The Commission thus recommended against reimposing extensive rate regulation on the cable industry and cautioned that such action could threaten future improvements in cable programming and facilities.

In the effective competition proceeding, the FCC's underlying premise is that while broadcast signals alone continue to provide competition to cable systems, there are other sources of competition that should not be ignored. Although NCTA agrees with this premise, it is concerned that, given the cautious approach to reregulation advocated in the FCC's 1990 Report to Congress, the Commission's proposals for measuring the presence of effective competition would unnecessarily subject a great majority of cable systems to reregulation by city councils. As Congress knew in passing the 1984 Cable Act, city councils are political bodies, not quasi-judicial regulatory agencies, and are ill-equipped to regulate telecommunications industries in an impartial and economically sound manner.

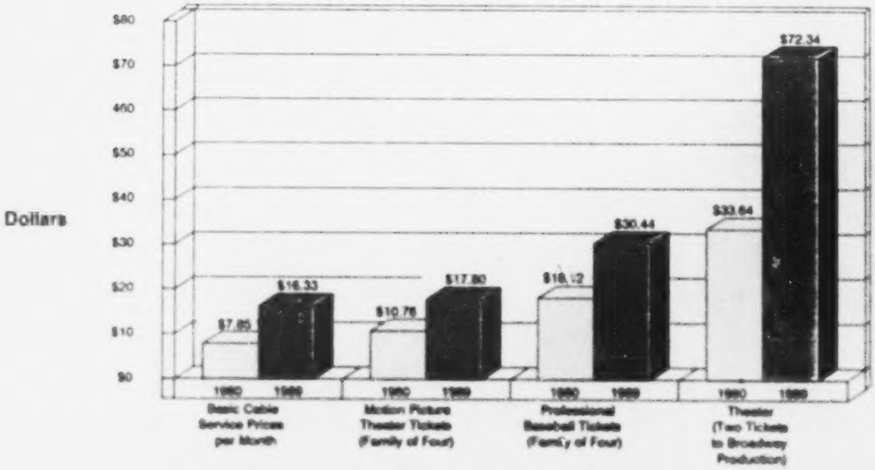
Despite NCTA's misgivings about the FCC's effective competition proceeding, it seems reasonable to allow this expert agency to complete its rulemaking, and for the impact of these new rules to be assessed, before Congress tries to amend the law that the Commission is implementing.

III. CABLE IS AN EXCEPTIONAL INFORMATION AND ENTERTAINMENT VALUE

Cable is one of the best information and entertainment values available in the United States today and is popular with Americans from all walks of life. For about 50 cents a day — the cost of one issue of USA TODAY — cable provides most viewers with 34 or more channels of television 24 hours per day. As Chart 1 indicates, it costs more to take a family of four to one movie, the theater, or a baseball game than it does to buy one month of cable service.

Chart 1

Prices of Various Forms of Entertainment

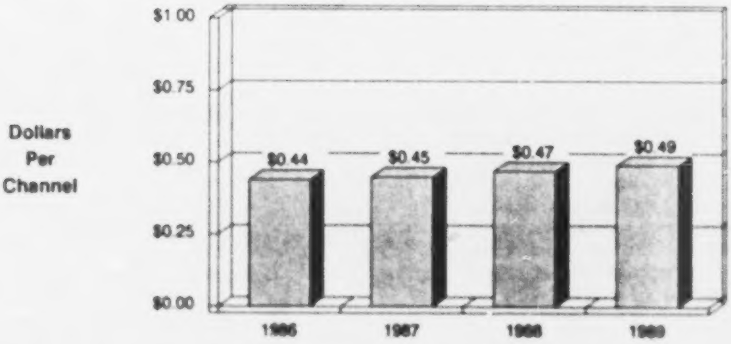


Source: Cable rates – 1980 (12 channels, or $.65 per channel), Paul Kagan Associates, Inc., Cable TV *Investor*, November 29, 1988, p. 9; 1989 (34 channels, or $.48 per channel), U.S. General Accounting Office, *Follow-up National Survey of Cable Television Rates and Services*, June 13, 1990. Motion picture theater tickets – 1980, National Association of Theater Owners, *Encyclopedia of Exhibition 1987*, Wayne R. Green, ed., New York, NY, p. 28; 1989, Variety, February 7, 1990, p. 11. Professional baseball tickets – Major League Baseball. Broadway production ticket price – Variety, May 31, 1989, p. 72.

Consumer confidence in the value of cable television is reflected in the fact that cable continues to attract new subscribers even as the economy falters. Although rates have risen since deregulation, so have the number of channels provided by cable systems (from an average of 27 in 1986 to 34 in 1989). As Chart 2 indicates, the cost per channel of basic cable service has remained below fifty cents a channel since the Cable Act took effect in 1986. Consumers recognize the fact that they are getting better programming and more channels for their dollar than they did five years ago.

Chart 2

GAO Survey Results:
Costs Per Basic Service Channel
1986 –1989



Source: U.S. General Accounting Office, "Follow-up National Survey of Cable Television Rates and Services," June 13, 1990. The GAO study results indicate that the number of basic channels received by the average cable customer increased from 27.1 channels in November 1986 to 33.8 channels in December 1989.

As the cable industry develops and fulfills the promise of the 1984 Act, there is little argument that customers like our programming. Perhaps the greatest evidence of cable's success in this area has been produced by our principal competition -- the broadcasters. In 1989, the National Association of Broadcasters' Television Information Office commissioned The Roper Organization to survey America's attitudes toward television. Roper asked members of the public to compare cable television with network television. The result of this poll was that cable received better marks than network television for entertainment, sports, education, culture, and children's programming; cable also provided better overall programming and greater diversity than broadcast television.

CHART 3

1989 ROPER POLL
(percentages)

	Regular TV	Cable TV	Both the Same	Do Not Know
Better entertainment programming	26	47	16	11
Better national news coverage	45	33	11	11
Better local news coverage	72	11	7	10
More educational programs	28	47	11	14
More sports programming	17	61	10	13
More cultural programming	22	51	10	16
Better quality programs overall	32	37	16	14
Better programs for children	31	39	11	20
Greater program variety overall	24	52	12	12

A follow-up poll by The Roper Organization in April 1990, using different categories, produced similar results: viewers found that cable TV had better "variety" and was more "interesting," "educational," and "stimulating" than commercial broadcast television; concomitantly, more viewers thought that commercial broadcast television was "dull," "too simple minded," and "getting worse" (The Roper Organization, The Public Pulse, April 1990: p. 4). These Roper polls clearly demonstrate that the investments which the cable industry has made in programming since deregulation have resulted in higher quality programming -- quality that consumers perceive and appreciate.

Yet cable's popularity does not stem from its being a "necessity" or a "utility," as some of our detractors allege. Only 59 percent of homes with television subscribe to cable, even though it passes 90 percent of television households. This penetration rate underscores the fact that alternatives to cable do exist in the form of broadcast signals, MMDS systems, C-band satellite services, and VCRs (which are owned by over 70 percent of American households). It also reminds us that cable television is a subscription service -- a matter of choice. If customers become displeased with their cable service, they can cut it off at a moment's notice.

IV. REREGULATION WOULD THROTTLE INVESTMENT IN NEW PROGRAMMING AND IMPROVED CABLE TECHNOLOGY

When Congress passed the Cable Communications Policy Act in 1984, it preserved substantial local government regulatory authority to regulate cable systems in such areas as awarding cable franchises and setting customer services requirements. At the same time, the Act provided two factors necessary for cable operators to begin large-scale, long-term investments in their systems and services: regulatory stability and the ability to price and package services independently.

Some industries and other interest groups are calling for reregulation of the cable industry by local governments. This would return a national telecommunications industry to pre-1984 days when city councils voted on all rate increases proposed by a local cable operator. Rolling back the clock to the early 1980s will choke off investment in new programming and improved cable technology. The result would be a freeze in the development of new cable networks and a delay in the introduction of new technology such as fiber optics and HDTV.

The debate about the 1984 Cable Act has been marked by a range of claims -- most of them unfounded. Here are the facts:

A. Cable Rates

In 1990, the General Accounting Office found that the average monthly bill for a cable subscriber (including basic service, pay services, outlet fees, and equipment rentals) increased by 21 percent from November 1986 to December 1989. Rates for the type of basic cable service purchased by most subscribers rose by 39 percent during this period, from $11.71 to $16.33 per month.

While these increases are not inconsequential, they reflect the fact that cities kept cable rates artificially low (72 points behind inflation) between 1972, when the FCC first affirmed local rate regulation, and 1986, the last year before the Cable Act took effect.[1] Indeed, cable rates still lag behind inflation, even four years after deregulation. As Chart 4 illustrates, the average price of basic service would have grown from $5.85 in 1972 to $17.33 in December 1989 if basic service prices had simply kept pace with inflation. In fact, customers paid $16.33 — 6 percent *less* than the price that would have been expected after inflation.

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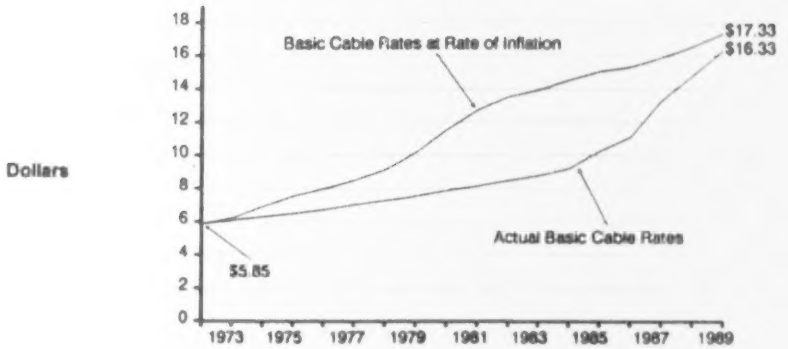
[1] Between 1972 and 1986, basic cable rates grew by 89.6 percent, from $5.85 to $11.09, while the CPI for all consumer items grew 162 percent from 41.8 to 109.6 (Paul Kagan Associates and Bureau of Labor Statistics, respectively).

Chart 4

Inflation–Adjusted Basic Cable Rates Vs. Actual Basic Rates 1972 –1989



Source: 1972–1987: Estimate of Paul Kagan Associates, Inc.; 1988–1989: U.S. General Accounting Office, "Follow-up National Survey of Cable Television Rates and Services," June 13, 1990. 1990 data not yet available. Inflation based on Bureau of Labor Statistics, Consumer Price Index. Adjustment assumes basic cable rates grew at rate of inflation, beginning in 1972.

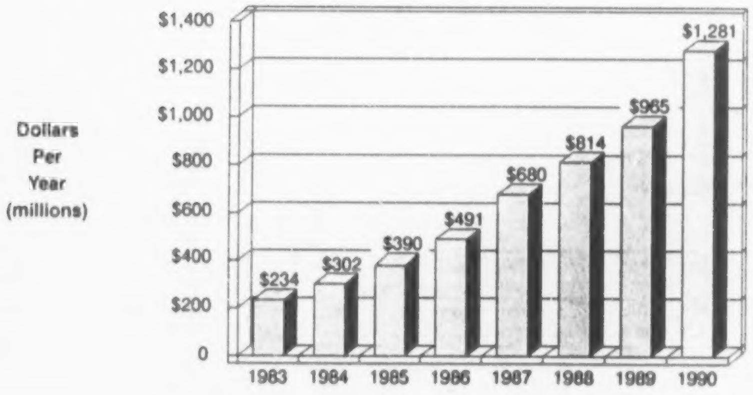
B. Benefits of Deregulation

Prior to deregulation, city councils often refused to authorize rate increases — fearing to vote for a price increase "on the record." The results of this reluctance were predictable: not only were cable rates held artificially low, but operators did not have the resources needed to invest in new programming or to upgrade their plant and equipment.

Deregulation has reversed this trend and led to substantial investments in programming, plant and equipment — investments that have directly benefited consumers. As illustrated in Chart 5, investment by cable operators in basic cable programming has jumped from about $300 million in 1984, when the Cable Act was passed, to over $1.2 billion in 1990. This investment has led to a dramatic increase in both the availability and quality of basic cable program networks such as ESPN, The Discovery Channel, Nickelodeon, Black Entertainment Television, and CNN.

Chart 5

Cable Systems' Expenditures
for Basic Cable Programming
1983 – 1990

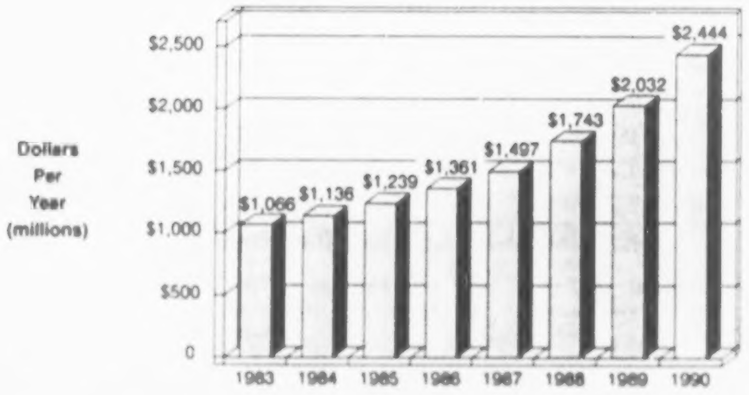


Source: NCTA estimate based on Paul Kagan Associates, Inc. data. Pre-1983 data not available.

Overall spending by both basic cable networks and premium networks (like HBO, Showtime, and Disney) for programming has also been stimulated by deregulation, doubling from about $1.1 billion in 1984 to more than $2.4 billion in 1990 (see Chart 6). This spending has directly benefitted consumers, helping to support the broad array of new and original programming on cable television.

Chart 6

Total Cable Network (Basic & Premium) Programming Expenditures 1983 – 1990



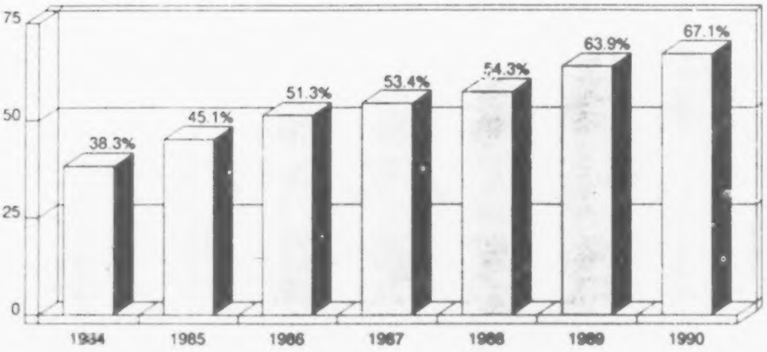
Source: Paul Kagan Associates, Inc. data. Pre-1983 data not available.

Similarly, deregulation has enabled operators to substantially increase their investments in plant and equipment; spending for this purpose has totalled over $5.1 billion dollars since 1984. These investments have improved picture quality and reliability.

In much the same way, operator investment in plant and equipment has benefitted consumers by increasing the number of channels available. In fact, since 1984, the percentage of cable systems with more than 30 channels has risen from 38 to 67 percent (see Chart 7). Moreover, the cable industry plans to spend $16.8 billion in the coming decade to further upgrade plant and equipment. Much of this spending will be used to deploy fiber optic technology and enhance cable's existing broadband network, resulting in more channel capacity and better picture quality. (See for example Time Warner's announcement on March 7, 1991, that it would deploy a 150-channel interactive fiber cable system in New York by year's end.) Indeed, a leading industry analyst, Paul Kagan, estimates that cable's deployment of fiber will grow at an annual rate of 25 percent over the next decade. In addition, through Cable Labs, the industry's research and development consortium, operators will continue to test the latest in high-definition television, interactive services, and other innovative technologies.

Chart 7

Percentage Of Cable Systems With Channel Capacities of Thirty Channels Or More 1984 – 1990



Source: Warren Publishing, *Television & Cable Factbook, Cable & Services Volume*, various years.

C. Customer Service

The cable industry has faced customer service problems in the past few years. In part, this reflects the dramatic growth in households that subscribe to cable -- from 14 million at the beginning of the 1980s to approximately 55 million today. Many operators simply did not have the facilities in place to manage this growth in their customer base. However, the cable industry moved aggressively in 1990 to address the issue of customer service.

To demonstrate our commitment to the consumer, and in response to concerns expressed by members of Congress and the public, NCTA's Board of Directors adopted customer service standards on February 14, 1990 (see Appendix A). These voluntary standards address critical elements of customer service including office hours, telephone response time, installations, repairs, service calls, bills, and refunds. On February 15, the Community Antenna Television Association (CATA) adopted the same standards. As a result, virtually every cable operator in the country has committed to improve customer service by implementing the guidelines no later than July 1991.

These standards are not a gimmick. They were developed by NCTA's Customer Relations Committee and a task force consisting of operations executives from the top 40 cable multiple system operators. The new standards, which focus on high-priority areas of service identified by consumers, are the product of months of discussion. They represent tangible, specific indications of the kind of service cable operators nationwide are committed to providing. Although anti-trust laws prohibit NCTA from making these standards compulsory, cities and states have the authority to enforce them by writing them into franchise agreements and local ordinances. Indeed, the State of New York recently adopted analogous standards by statute.

If the cable industry is forced to return to the days when city councils set cable rates -- and investments in programming, plant, and equipment were stifled -- then the substantial progress that the cable television industry has made in improving the diversity and quality of television for American consumers will be stopped dead in its tracks.

In particular, the effect of reregulation on new and innovative cable networks — services that meet the needs of viewers long ignored by the broadcasters' "lowest common denominator" programming — will be immediate and severe. The revenues generated by deregulation will no longer be available for operators to purchase programming from existing networks or to invest in new networks.

Cable television has emerged not only as "more" television, but as "better" and "different" television. The recent war in the Persian Gulf highlighted cable's ability to provide timely, 24 hour-a-day news coverage on CNN. Likewise, cable television includes quality children's programming on Nickelodeon; it is round-the-clock sports on ESPN; it is original documentaries on The Discovery Channel; it is gavel-to-gavel coverage of the House and Senate on C-SPAN I and II; it is the only network devoted to Black Americans — Black Entertainment Television.

Deregulation of cable rates is only four years old, and already the cable industry is fulfilling its promise of bringing quality and diversity to television. The future of cable and the distinctive programming it offers to consumers should not be thrown back into the political arena of city councils.

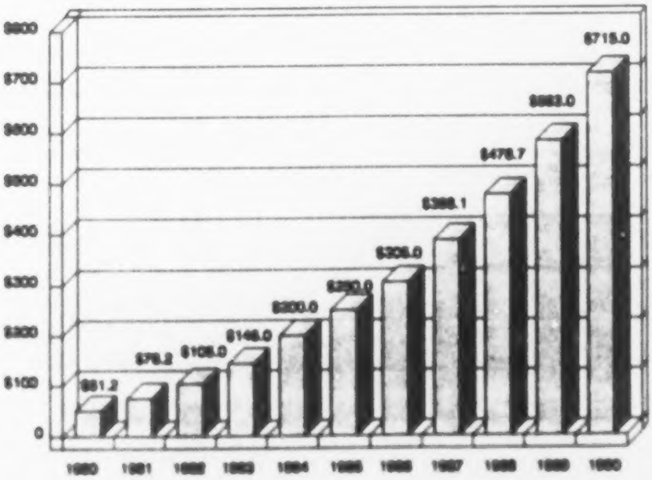
D. Cable in the Community

Since enactment of the Cable Act, cable companies have continued to be active in serving their communities and the nation as a whole. For example, in 1989, several dozen multiple system operators (MSOs) and cable program services launched the Cable Alliance for Education. The Alliance offers a non-profit service, Cable in the Classroom, which provides free hook-ups and basic cable service to all junior and senior high schools passed by cable systems. In some areas, cable systems also offer satellite dishes at cost to schools outside their service areas so that these schools may receive free cable programming and information services. Cable in the Classroom offers free use of 20 different cable networks that span a wide variety of topics, including news, documentaries, drama, performing arts, and curriculum-based programs for math, English, science, social studies, biology, foreign languages, health, vocational, and technical studies. In addition, cable networks who are members of Cable in the Classroom have agreed to provide no commercial interruptions, copyright clearances (so that programs can be taped and used later in the classroom), and curriculum-based support materials. Cable operators often assist in this effort by providing equipment, including VCRs, monitors, teaching materials, and computers to participating schools.

In addition to their educational outreach programs and their charitable work in local communities, cable companies joined to create two non-profit program networks, C-SPAN I and II, which offer gavel-to-gavel coverage of the House of Representatives and Senate respectively. Moreover, cable companies provide cities with an important source of annual income in the form of franchise fees, which can amount to 5 percent of a cable company's gross operating revenues. Since 1980, the cable industry has paid local governments $3.3 billion in such fees. As Chart 8 indicates, the cities' income from franchise fees has been rising steadily over the past decade and reached $715 million in 1990.

Chart 8

Franchise Fees Paid by Cable Systems
1980 – 1990
(in millions)



Source: Paul Kagan Associates, Inc., Cable TV Franchising, January 31, 1991, page 3

V. PROBLEMS WITH S. 12

S. 12 goes beyond even the provisions contained on S. 1880, the "Cable Television Consumer Protection Act" reported by the Committee on Commerce, Science, and Transportation on June 7, 1990. Almost all of the changes made in S. 12 work against the interests of the cable industry and take no notice of several important developments which occurred during deliberations on cable legislation in 1990. For example, the must carry language in S. 12 mirrors that contained in S. 1880 while ignoring the NCTA-NAB-INTV compromise which was reached after the Senate markup (that agreement was worked into the House bill, H.R. 5267, last summer). Similarly, the program access language contained in S. 12 reiterates the language which forced the cable industry to oppose S. 1880; it ignores the compromise suggested by Senators Gore and Wirth last October.

The main problems with S. 12, the "Cable Television Consumer Protection Act of 1991," are as follows:

A. Program Access and Exclusivity

S. 12 expands the provisions of S. 1880 which mandate access to cable programming by cable's competitors to include regional networks, not just national program networks. It also borrows language from the House-passed bill, H.R. 5267, which broadens the scope of the Commission's rulemakings vis-a-vis vertically integrated cable companies.

There was general agreement among Senators and most witnesses appearing before this subcommittee last year that programming was cable's undeniable success story. The industry was praised for its innovative program services and complimented for investing so much capital and creative talent in new networks. Furthermore, there seemed to be general agreement that cable legislation should do nothing to harm programmers or their ability to bring new television shows and networks to the American consumer. However, harming the cable programmer is exactly what S. 12 will do.

1. The Problem With Mandated Access to Cable Programming

The cable industry has revolutionized the scope and value of American television. Before the advent of cable, TV was, quite simply, ABC, NBC, and CBS. Until the 1970s, these three broadcast networks were the sole source of television for most Americans and garnered nearly all of the viewing audience. Today, cable companies provide consumers with the ability to choose from among dozens of different channels offering quality programming.

Now, however, some of cable's competitors want a free ride based on the cable industry's success. Rather than pursue their own vision and take the risks necessary to develop their own video programming, these competitors want a federal warrant to become affiliates of cable program networks: they are seeking legislation which would give them mandated access to cable programming. Some of those who have asked Congress to legislate on their behalf include underwriters of DBS ventures, such as GE/NBC, Rupert Murdoch, and GM/Hughes Aerospace; MMDS operators; and satellite dish distributors who want to package programming in addition to selling hardware.

There is no precedent in American business practice or copyright law for forcing owners of intellectual property to sell their product to all comers — especially their competitors. For example, in order to reprint syndicated columns, newspapers must sign contracts with authors and pay them. Similarly, in order to carry CBS's or NBC's signals, broadcasters must become affiliates of those networks. Exclusivity is an important part of such agreements — there is only one CBS affiliate per market.

The Federal Communications Commission has long recognized the importance of exclusive network-affiliate relationships in its broadcast network non-duplication rules: these rules force a cable company to black out the signal of a broadcast network's out-of-town affiliate at the request of the local affiliate, thus preserving the local affiliate's status as the exclusive outlet for a network's programming in its community. Similarly, the FCC reaffirmed the importance of exclusivity when it reinstated syndicated exclusivity rules in 1989; these "syndex" rules allow broadcasters to acquire exclusive distribution rights for individual television programs in their markets. It is important for Congress to preserve the right of all programmers, including those in the cable business, to exercise control over their own material and to decide who should distribute it.

2. Competition in the Video Marketplace

Competition in the distribution of video programming generally occurs between media within a discrete geographic market. There can be little disagreement that CNN and Headline News compete directly with ABC, NBC, and CBS's news operations; that Arts and Entertainment and The Discovery Channel compete against programming typically found on PBS; or that ESPN competes against sports programming carried by broadcasters. Furthermore, the cable industry has found it highly effective to compete against broadcasters by serving market segments ignored by television stations. CNN, Black Entertainment Television, Nickelodeon, and Spanish-language networks allow cable operators to attract viewers by serving interests in the community which the local broadcasters have largely ignored or abandoned. It is important that public policy not eliminate the incentives for competition in the video marketplace.

3. Exclusivity and Federal Law

Product differentiation is the key to successful competition in the distribution of video programming. It is new programming featuring innovative ideas and quality production that attracts television viewers, not *Friday The 13th, Part 5*, or remakes of last year's sitcoms. Exclusivity is the best means to protect the identity and character of one's product, which is why new television networks — broadcast and cable alike — want to determine how and by whom their products are exhibited. Federal law has long recognized that by protecting exclusive rights to intellectual property, one enhances competition and provides for increased diversity of information and entertainment. Indeed, federal policy has recognized that disruption of these exclusive rights works against, not for, competition.

On March 21, 1989, the FCC took steps to strengthen a broadcaster's exclusive rights to television programming. First, it broadened the long-established network non-duplication rules by expanding the situations where local broadcast stations affiliated with networks like ABC, NBC, or CBS, can prevent local cable systems from carrying out-of-town stations affiliated with the same network. Second, the Commission issued an order which reinstated syndicated exclusivity for broadcasters effective January 1990. Federal policy thus does not permit cable to use its compulsory license to import a program from an out-of-town television station (typically an independent) if a local station has exclusive rights for that program in its community.

In much the same way, Congress recognized the need to protect program exclusivity in the Satellite Home Viewer Act of 1988. The law extends a compulsory license to satellite carriers to make broadcast signals available to home satellite dish owners. Congress restricted that license, however, so that home dish owners may not receive a network's programming via satellite if they have access to an over-the-air broadcast station affiliated with the same network.

4. Exclusivity and Competing Technologies

Some satellite dish dealers and MMDS operators, who have seen the rising popularity of cable programming, now maintain that they would like to "compete" with cable by selling its programming. This, of course, comes after cable networks and cable operators have taken all of the risks to develop the programming and establish its brand name identity. Various groups have come to Congress and demanded that cable networks be stripped of their ability to determine how to distribute their intellectual property. These groups want cable networks, and only cable networks, to be statutorily deprived of their exclusive right to distribute their own programming.

Such proponents of "competition" are not promising to expand the diversity of programming options in the marketplace or to provide consumers with more entertainment and information. Rather, they simply want a federal warrant for cable programming, an approach that violates the principle of protecting one's intellectual property rights.

5. The Availability of Cable Programming Networks to MMDS Systems and Home Satellite Dishes

Certain MMDS operators and satellite dish dealers have alleged that vertical integration in the cable industry has led MSOs to force cable networks to withhold programming from them. While some individuals may not have distribution contracts for the particular networks they might wish to sell, a comprehensive study by Dr. Benjamin Klein, Professor of Economics at the University of California, Los Angeles, demonstrates that cable networks are generally available to MMDS systems and home dish owners (see "The Competitive Consequences of Vertical Integration in the Cable Industry," June 1989).

According to Dr. Klein, MMDS systems carried a total of 42 cable program services in 1989. Furthermore, he found that all of the top 10, and 22 of the 28 most popular basic and premium networks, were sold to MMDS systems. Contrary to some claims, MMDS systems do offer their subscribers program services which are among the highest-rated and most popular cable networks available, including ESPN, Superstation TBS, HBO, CNN, Nickelodeon, Lifetime, and MTV. Currently, the availability of basic cable programming is such that the Wireless Cable Association reported in December, 1990, that every major program service but one can be obtained by its members (Paul Kagan Associates, Inc., Wireless Investor, December 17, 1990: p. 2).

In addition to a full range of basic cable networks, MMDS operators offer service to their customers at retail rates comparable to the rates charged to cable subscribers. In many cases, MMDS rates for basic service are lower than for comparable packages on cable systems. For example, in Philadelphia, Pennsylvania, ACS Enterprises charges its wireless cable subscribers $15 per month for a package of 10 basic services, including CNN, The Discovery Channel, ESPN, Nickelodeon, Lifetime, A&E, and Superstation TBS. In addition to the basic package, ACS's subscribers can purchase either HBO or Cinemax for $10 per month. According to data from the GAO, cable customers paid $16.33 per month for basic service and $10.24 per month for HBO in December 1989.

The same conclusions about access and pricing are true for satellite dish owners: cable programming is widely available to dish owners and at prices that are comparable to, if not lower than, cable rates. As this Committee advised the Senate in its report to the 100th Congress on S. 889, the "Satellite Television Fair Marketing Act":

> The evidence presented at the hearing demonstrated that scrambled signals of cable programming are being made available to dish owners at prices comparable to those being charged cable subscribers. At the hearing, there was no dispute that all of the cable programming services that scramble now distribute their programming to dish owners (Senate Report 100-272: pp. 6-7).

Indeed, the president of SkyPix (a DBS system that plans to offer 130 different channels of satellite-to-home video by 1993) recently stated that "the market is working" and that legislation mandating access to cable programming is not warranted (Warren Publishing, Inc., Communications Daily, December 3, 1990: p. 1).

This Committee's finding was supported by the GAO, which found that the average price of basic cable service in December 1989 was $16.33 per month; the average cost of cable-delivered basic service plus a premium network channel, such as Showtime, was $26.35 per month (General Accounting Office, Follow-Up National Survey of Cable Television Rates and Services, June 13, 1990: pp. 60, 72). Yet, packages of basic programming networks comparable to what cable subscribers receive (such as those offered by Viacom's Showtime Satellite Network) are available to dish owners for as little as $13.25 per month. Basic service packages, plus a premium network such as Showtime, are available to dish owners for as little as $18.75 per month, far lower than the corresponding price which cable subscribers pay.

The evidence is clear that cable companies are not using their ownership interests in cable programming networks as a tool to foreclose the market to competing delivery systems. Although exclusive licensing of programming is common in many parts of the entertainment business and is a well-accepted contractual element in increasing the value of copyrighted artistic works, vertically integrated MSOs are not demanding such exclusivity for their cable programming. The evidence is that cable programming networks, including those networks with MSO affiliations, have been made available to home satellite dish owners and MMDS systems.

6. The Issue of Mandated Access is Really About Pricing

The debate over program distribution is not really about access: it is about who gets to keep the profit margin — the network programmer or the distributor? Some of cable's competitors would like to acquire cable programming at the lowest wholesale price available -- regardless of exclusive distribution contracts, the costs that cable operators have borne in marketing and developing name recognition, or the risks already taken by networks and operators to develop and distribute cable programming.

Mandated access to cable programming has come to mean not only access, but also a requirement that other distributors, like MMDS operators, get to distribute cable networks at the same wholesale cost as cable operators. In essence, this means that the government would nationalize cable programming and set wholesale prices. Moreover, it would deny cable programmers the right to differentiate their wholesale price based on each different distributor's capital costs, marketing commitments, and financial stability.

Even if one believes that there is a problem with the distribution of cable programming, the object should not be to mandate a uniform wholesale price, since this would prevent a programmer from realizing the full value of his product. Not all distributors of cable programming have the same operating costs. For example, because of franchise fees and the expense of wiring every subscriber's home, it is more expensive to operate a cable system than it is an MMDS system. It would be unfair to require a programmer, as a matter of law, to hand over all of the additional margin that he could earn in a wireless market to an MMDS distributor. Rather, the object should be to ensure that alternative distributors such as MMDS operators get a wholesale price for cable programming which allows them to compete fairly with cable distributors at the retail level. This already occurs, as noted above in the comparison between what MMDS subscribers, home dish owners, and cable subscribers pay for similar programming.

7. Equal Treatment Under The Law

In practice, cable programming is widely available to American consumers through cable operators, MMDS systems, C-band home satellite dishes, and, on a trial basis, DBS. Cable programmers and affiliated cable operators are not using exclusivity to impede fair retail competition. However, as a matter of policy, NCTA believes that cable programming networks deserve the same rights as broadcast networks, motion picture distributors, and other disseminators of intellectual property to enter into exclusive distribution/affiliation agreements.

B. The Scope of Reregulation in S. 12 is Overly Broad And Gives Too Much Control to the Cities

S. 12 greatly expands the power of the FCC and the cities to regulate the cable industry. Several of the provisions in S. 12 allow city councils to micromanage cable systems and deny renewals of franchises. City councils are not impartial, quasi-judicial bodies that are well-equipped to regulate business enterprises. Rather, they are political bodies which seek to maximize concessions from franchisees while giving very little consideration to the ability of regulated entities to earn a fair return on investment.

There was widespread sentiment voiced in this Committee last year that Congress should not Balkanize the cable industry by returning it to the control of 9,000 different city councils. The cable industry is an important national telecommunications industry, and it warrants oversight at the national level. Yet S. 12 expands the powers which S. 1880 gave to the cities and adds several new ones. This expansion of city control contradicts the policy embodied in the Cable Act of 1984 as well as the testimony received by Congress on S. 1880 and H.R. 5267.

1. Basic Rate Regulation

S. 12 uses S. 1880's two-tiered approach for regulating basic cable service but provides greater regulation of (a) cable networks delivered beyond the basic service tier; (b) charges associated with non-basic programming, and (c) selection of service options.

The bill adds two new sections to the language drawn from S. 1880 which gives the FCC initial responsibility for ensuring that rates for basic service -- including the installation or rental of equipment -- are reasonable whenever a cable system is not subject to effective competition: (1) The FCC would be required to ensure that charges for changes in service tiers are reasonable, and (2) The Commission's authority to regulate rates by general rule, rather than by complaint, would be limited to basic service "except that if fewer than 30 percent of all customers to that cable system subscribe only to basic cable service, the Commission also shall ensure that the rates are reasonable for the lowest-priced tier of service subscribed to by at least 30 percent of the cable system's customers" [section 5: 623(b)(1)].

2. "Bad Actor"

S. 12 revives the "bad actor" provisions of S. 1880 and expands them. Under the new bill, a franchising authority or subscriber of any cable system not subject to effective competition may file with the FCC, within a reasonable period of time after a rate increase, a complaint alleging that the new rates are "unreasonable" (S. 1880 used the term "significantly excessive"). However, S. 12 goes beyond the provisions of S. 1880 by specifying that rate increases are not limited to increases in the cost per tier, but can also include "an increase which results from a change in that system's service tiers or from a change in the per channel rate paid by subscribers for a particular video programming service..." [section 5: 623(c)(1)].

In addition, S. 12 includes a new criterion for determining "reasonableness" which requires the Commission to compare the rates for services charged by cable systems subject to effective competition to those rates in question under the bad actor complaint. Finally, S. 12 expands the bad actor regulation of S. 1880 to include charges for installation or rental of equipment used to receive any programming, including basic service and satellite-distributed cable networks, other than pay services and pay-per-view services.

3. Customer Service

S. 12 abandons the approach taken by S. 1880 on customer service and substitutes a more sweeping regulatory proposal.

S. 1880 required the Commission to determine whether the cable industry has established customer standards and if so, whether those standards are effective in ensuring that customers are fairly served. The Commission would issue rules only if it found that the industry had no standards assuring reasonable customer service or that such standards did not work.

S. 12 would require the Commission to establish customer service rules while grandfathering any municipal ordinance, agreement, or state law in effect on the date of enactment which exceeded the Commission's rules. In addition to this grandfather clause, cities would be permitted to establish customer service requirements that exceed the standards set by the FCC unless, following a petition by the cable operator, the Commission declares -- after notice, hearing, and based upon substantial evidence — that the particular franchising authority's customer service requirements are not in the public interest.

4. Limitation of City Liability for First Amendment Damages

For cases filed under the Civil Rights Act, S. 1880 contained a provision which limited a city's liability for violations of First Amendment rights to injunctive relief, declaratory relief, and attorneys' fees unless and until a court of binding jurisdiction found such actions to be in violation of the First Amendment.

S. 12 reiterated these provisions with two important changes in the cities' favor. First, under S. 1880, liability for claims filed before enactment were arguably not covered. S. 12 extends the limitation of liability to any court proceeding pending on the date of enactment or initiated after such date. Second, S. 12 adds a qualifier to the termination of the city's limit on liability such that a violation must have been determined by a final order of a court of binding jurisdiction, no longer subject to appeal, to contravene the First Amendment.

It should be noted that S. 12, like S. 1880, limits liability only to those actions which are expressly authorized by or required by the Cable Act. Cities have contended they should be insulated from liability for any action not prohibited by the Cable Act. The irony here is that the cities' desire to limit their liability in Civil Rights cases stems from situations where cities have denied a second cable operator the ability to overbuild an existing operator on the grounds that they have awarded the first operator an exclusive franchise. As such, this provision of S. 12 reinforces the notion that there should be only one cable operator per community and that nothing should impede a city's right to award only one cable franchise in that community. It is a provision hostile to competition.

5. Franchise Renewal

S. 12 goes far beyond the renewal changes proposed by S. 1880, as follows:

(a) The bill adds a new provision which would require a cable operator to file a written notice 30-36 months prior to renewal expiration specifically requesting a franchising authority to initiate the formal renewal process provided by the Cable Act. If an operator fails to provide timely written notice specifically requesting the initiation of this process, none of the procedural or substantive protections of the Act would apply. This provision also makes it explicit that, even with the filing of such notice, the franchising authority is not required to commence a renewal proceeding during the 30-36 month period prior to the expiration of a franchise.

(b) Under the Cable Act, a franchising authority has four months from the completion of the date of initial proceedings to renew the franchise or to issue a preliminary assessment that the franchise should not be renewed and go to the next step in the process. S. 12 would change that time frame to 4 months from submission of cable operator's renewal proposal — not submission of the notice which invokes the process.

(c) Under the Cable Act, one of the statutory criteria to be assessed by the franchising authority is whether the cable operator has substantially complied with all material terms of the existing franchise and applicable law. S. 12 would amend this by allowing assessment of compliance "throughout the franchise term," effectively making the cable operator liable for non-renewal based on conduct of a previous operator where sale of a system has occurred during a franchise.

(d) Another Cable Act standard for renewal requires the franchising authority to assess the quality of the operator's service as to whether it has been reasonable in light of community needs. This standard, however, prohibits the franchising authority from judging the mix, quality, or level of programming provided by the system. S. 12 would amend this protection by prohibiting franchising authorities from looking only at the mix or quality of programming. A judgment on the level of programming could decide renewal. As with provision (c) above, S. 12 would also amend this statutory criterion to make the existing cable operator responsible for the conduct of the previous operator or operators where sales occur during the term of the franchise.

(e) The Cable Act prohibits a denial of renewal for noncompliance or failure to provide reasonable service if a franchising authority has not provided the operator with notice and the opportunity to cure or in any case in which it is documented that the franchising authority has effectively waived its right to object. S. 12 would prohibit denial of renewal only where the operator has notice and opportunity to cure, or in any case in which it is documented that the franchising authority has waived in writing its right to object.

(f) The Cable Act empowers a court to grant appropriate relief if it finds that the franchising authority is not in compliance with the procedural protections provided by the Act. S. 12 would amend this protection to require the court to find that noncompliance with procedure actually prejudiced the cable operator.

There is a fundamental paradox contained in the franchise renewal provisions of S. 12 which deserves comment. On the one hand, S. 12 seeks to promote competition and curb the "market power" which single cable franchises supposedly enjoy in certain markets. On the other hand, the bill reinforces the notion that there can and should be only one cable provider per community. Rather than encourage cities to invite a second cable system to overbuild the incumbent, S. 12 focuses on revoking the incumbent's franchise in order to allow a new sole provider of cable service into the community. The premise that one should replace one cable company sequentially with another is false: the Cable Act allows for several cable franchises in the same area at the same time. It is the cities, not cable companies, which are perpetuating the "monopoly" characteristics of some cable franchises, and S. 12 reinforces the perception that there can and should be only one cable franchisee per community.

Moreover, S. 12 seems to undermine one of the fundamental precepts of American business: the notion that companies are ongoing concerns. The Cable Act of 1984 does not guarantee cable operators a franchise: it merely assures them due process in franchise renewal proceedings. In situations where cities have denied cable operators renewal, the courts have upheld the cities in every single case. There is thus no evidence which would suggest that the renewal section of the Cable Act needs to be rewritten. What the cities are seeking in S. 12 is the authority to throw out incumbent cable operators at will in order to hold auctions for their cable franchises. The net effect will be to extort maximum financial benefits from each bidder, not encourage competition. S. 12 will do nothing to change the fact that there is only one cable system in most cities, but it will change the ownership of that system, thus disrupting service and consumer expectations.

VI. THE FINANCIAL COST OF S. 12

Aside from cumbersome new regulations, S. 12 would be costly for the FCC to implement. In 1990, the Congressional Budget Office estimated that it would require $15 million in new spending authority and $14 million in outlays for the Commission to implement S. 1880 as reported by the Commerce Committee on June 7, 1990; thorough implementation of S. 1880's requirements could have pushed its first-year cost to $22 million, with outlays of $46 million over five years (Senate Report 101-381: pp. 53-54). Similarly, on February 27, 1991, Alfred C. Sikes, Chairman of the Federal Communications Commission, told the House Appropriations Subcommittee on Commerce, State, Justice, and the Judiciary that it would take "millions of dollars and 250 new employees to administer S. 1880." S. 12 takes the costly regulatory provisions of S. 1880 and expands them, making the federal bureaucracy more elaborate, more burdensome, and more expensive.

VII. CONCLUSION: A CABLE BILL NOW WOULD BE COUNTERPRODUCTIVE

In 1989 and 1990, the cable industry agreed to work with members of this Committee to see if reasonable cable legislation could be drafted to address the problems of rates and customer service. What started then as a modest attempt to fine-tune the Cable Act of 1984 threatened to turn into a runaway train onto which city regulators and all of cable's competitors — broadcasters, MMDS operators, telephone companies, and DBS operators -- sought to jump aboard. Given the vast regulatory scope of S. 12 and the Administration's early threat of a veto, NCTA cannot support it or any other legislation patterned after S. 1880.

NCTA respectfully suggests that it would be counterproductive to pursue S. 12 at this time. We would urge the Committee to forebear at least until the FCC has had a chance to complete its rulemaking on effective competition and the Congress has had a chance to evaluate the impact of these new regulations on cable rates and customer service nationwide.

APPENDIX A

RECOMMENDED CABLE INDUSTRY
CUSTOMER SERVICE STANDARDS

February 14, 1990

The cable industry is dedicated to providing our customers a consistently high level of service. We are committed to ensuring that our customers receive a variety of quality programming; reliable, clear signals; and prompt, courteous service. To that end, we, as an industry, have voluntarily adopted the following Standards for Customer Service.

Each community and each cable system are different and a reasonable flexibility should be employed in applying these standards; rigidity will hamper rather than help good customer service. We are confident, however, that the cable industry as a whole will implement these voluntary standards by July 1991, and recommend them for overall operational use by that date.

1. **Office and Telephone Availability**

   A. Knowledgeable, qualified company representatives will be available to respond to customer telephone inquiries Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will staff telephones for supplemental hours on weekdays and/or weekends.

B. Under normal operating conditions, telephone answer time by a customer service representative, including wait time, and the time required to transfer the call, shall not exceed 30 seconds.

Those systems which utilize automated answering and distributing equipment will limit the number of routine rings to four or fewer. Systems not utilizing automated equipment shall make every effort to answer incoming calls as promptly as the automated systems.

This standard shall be met no less than ninety percent of the time measured on an annual basis.[2]

C. Under normal operating conditions, the customer will receive a busy signal less than three percent of the total time that the cable office is open for business.

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[2] In certain smaller cable systems with fewer than 10,000 subscribers, systematic measurement of compliance with some of these standards (e.g. telephone answering time) will not be cost effective and should not be expected.

D. Customer service center and bill payment locations will be open for transactions Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours on weekdays and/or weekends during which these centers will be open.

2. Installations, Outages, and Service Calls

Under normal operating conditions, each of the following four standards will be met no less than 95% of the time measured on an annual basis.

A. Standard installations will be performed within seven business days after an order has been placed. "Standard" installations are up to 125 feet from the existing distribution system.

B. Excluding those situations beyond the control of the cable operator, the cable operator will respond to service interruptions promptly and in no event later than 24 hours. Other service problems will be responded to within 36 hours during the normal work week.

C. The appointment window alternatives for installations, service calls, and other installation activities will be (a) morning, (b) afternoon, or (c) all day during normal business hours.

Additionally, based on community needs, cable systems will schedule supplemental hours during which appointments can be set.

D. If, at any time an installer or technician is running late, an attempt to contact the customer will be made and the appointment rescheduled as necessary at a time which is convenient for the customer.

3. Communications, Bills, and Refunds

A. The cable company will provide written information in each of the following areas at the time of installation and at any future time upon request:

- products and services offered
- prices and service options
- installation and service policies
- how to use the cable service

B. Bills will be clear, concise and understandable.

C. Refund checks will be issued promptly, but no later than the earlier of 45 days or the customer's next billing cycle following the resolution of the request, and the return of the equipment supplied by the cable company if service is terminated.

D. Customers will be notified a minimum of 30 days in advance of any rate or channel change, provided the change is within the control of the cable operator.

Once a cable system has fully achieved the standards, it can request a "Seal of Good Customer Service" from NCTA. It is then obligated to report annually to its local franchising authority and describe how it has met the standards. Under current federal law, local governments have the authority to set and enforce customer service requirements for cable systems.

QUESTION OF SENATOR PRESSLER AND THE ANSWER THERETO

Question: "I am concerned that alternative over-the-air programmers that compete with a program owned by a cable system are denied access to that cable system's subscribers. One example given to me, is where the Home Shopping Network is broadcast in markets served by TCI and Comcast owned cable systems. Can you tell me whether TCI and Comcast have denied access to Home Shopping Network to avoid competition with their own program, Quality Value Channel?"

Answer: Neither TCI nor Comcast has denied the Home Shopping Network (HSN) carriage on their cable systems to avoid competition with the QVC [Quality, Value, Convenience] Network. At issue here is not competition but an attempt by the Home Shopping Channel to get all of its broadcast stations, including low power television stations, carried on cable systems.

The Home Shopping Network distributes its signal to television viewers in two ways: (1) as a satellite-distributed cable network, and (2) as an over-the-air broadcast station (both full power and low power). Many cable operators carry HSN's satellite-distributed signal, and TCI is its largest single cable affiliate. Furthermore, it is the policy of most NCTA companies, including TCI and Comcast, to carry broadcast stations as if the FCC's must carry rules were still in force. Both TCI and Comcast carry most full-power television stations on this basis. Indeed, Storer, which is predominantly owned by TCI and Comcast, carries HSN on most of its 91 cable systems.

Cable operators have limited channel capacity and are responsible for filling these channels with programming that is most likely to meet the needs of their subscribers. In most communities, there is no demand for more than one home shopping channel: consumers prefer CNN's Headline News, C-SPAN, or other program services to a second home shopping channel. Carriage decisions regarding HSN stations, therefore, typically reflect editorial judgements about the mix of programming which a cable system's subscribers desire not a desire to limit competition.

Senator INOUYE. Thank you very much. Mr. Kennedy?

STATEMENT OF JAMES KENNEDY, CHAIRMAN AND CEO, COX ENTERPRISES, INC., ATLANTA, GA

Mr. KENNEDY. Thank you, Mr. Chairman.

My name is Jim Kennedy, and I am Chairman of the Board of Cox Enterprises. I am here today to express my opposition to S. 12.

Mr. Chairman, first let me thank the members of this committee who served in 1984 when the cable bill was passed. Your decision then to deregulate the cable television industry was correct, and it is correct now.

I admit freely that the rates have increased as a result of deregulation. But you should know that prior to the enactment of the cable act, from 1972 until 1986, the Consumer Price Index for all consumer items grew at 162 percent, while city councils allowed us to increase our basic rates less than 90 percent.

Our rates were kept artificially low for more than a decade, lagging a full 72 points behind inflation. Increases were therefore appropriate and to be expected. In my opinion now, the catch-up rate increases that came with deregulation are behind us. I know they are behind us at Cox Cable.

Since deregulation the cable industry has done so much more for our customers. We have developed new services, expanded capacity because our customers wanted it in the marketplace and they were ready and willing to pay for it.

Deregulation has allowed for the growth and development of the very best in creative and diverse programming, everything from Nickelodeon to C-SPAN to CNN and the Discovery channel.

Deregulation has meant increased channel capacity to provide for all of this programming. Since 1984 the average channel capacity has increased by 40 percent, and we anticipate it will increase another 50 percent in the next 5 years.

Because we have finally had the money to invest, customer service has been vastly improved. Our customers can now reach service representatives on the average of 25 seconds or less, we answer our phones. We install new customers within 3 days, and we service the vast majority of our existing customers on the day they call in, no matter what day that is.

Continued deregulation will allow us to do so many more things that our customers want, but our progress will be halted if we become subject to a plethora of diverse and crippling rate regulations in all the various cities we serve.

We can do so much more for America's fragile education system with industry-wide efforts like cable in the classroom. We can keep our country in the forefront of the rest of the world with technological advancements like fiber optics, high definition television, data transmission, home security and much, much more.

But the vitality of the cable industry depends upon a climate that promotes further investment and future innovation. We cannot maintain Cox Cable's current commitment to state-of-the-art technology, excellence in customer service, quality programming and community involvement if we are subject to a barrage of local rate regulations.

In our case, that would mean regulation by 111 different cities in our 24 markets. We would have to spend more time wining and dining city and county officials and meeting their private political agendas than we could spend on customer service.

Here is the bottom line: We cannot maintain our current level of capital investment in fiber optic plant and new services, an amount that for Cox will exceed $500 million in the next 5 years, if we are subject to the regulatory whims of 111 different local governments.

The fact is we are already regulated at every level of government today, and city and county governments continue to hold the final authority to renew or deny existing licenses. They can grant a second franchise to a competing operator where they believe there are instances of shoddy service or exorbitant rates.

Mr. Chairman, I urge you and members of this committee not to hamstring the American consumer by restating onerous rate regulation. Let annual industry-wide investment in programming and plant and equipment continue at the current $2 billion a year rate, in a stable climate for investment and innovation.

Legislation that retreats to the failed regulatory policies of the 1970's would destroy this industry's ability to be innovative and improve and even maintain the level of service that we are able to provide today.

Thank you for this time.

[The statement follows:]

STATEMENT OF JAMES C. KENNEDY
CHAIRMAN AND CHIEF EXECUTIVE OFFICER
COX ENTERPRISES, INC.

Good afternoon Mr. Chairman and members of this committee. My name is Jim Kennedy. I am Chairman of Cox Enterprises.

Please let the record show that I cannot support passage of Senate Bill 12. I have also submitted written testimony to substantiate my views.

Mr. Chairman, I begin my remarks this afternoon with a thank you to members of this Committee who served back in 1984 when the Cable Act was passed by Congress with the recommendation of this Committee.

While many good things resulted from passage of the Cable Act, perhaps the most important was the deregulation of basic rates.

I admit to you that rates have increased as a result of this deregulation. But you should know that prior to enactment of the Cable Act, from 1972 to 1986, the CPI for all consumer items grew 162%, while city councils allowed us to increase our basic rates by only 89.6%. Our rates were kept artificially low for more than a decade, lagging a full 72 points behind inflation. Increases were therefore appropriate and to be expected. In my opinion, the adjustment from a regulated to a deregulated environment is behind us.

Since enactment of the Cable Act in 1986, the cable industry has been able to do so much more for our customers because of our increased ability to budget and forecast into the future -- something we were unable to do under rate regulation.

Deregulation has allowed us to provide our customers with:

- the very best in creative and diverse programming;
- increased channel capacity to provide for all of this programming;
- state-of-the-art technology, including the use of fiber optics to better ensure the reliability of a quality signal into our customers' homes;
- meaningful customer service programs, including the training of all front line employees who come into personal contact with our customers each and every day. At Cox, our customers can now reach service representatives on average within 25 seconds or less; we install new customers within three days and service existing customers in a timely and professional fashion -- the vast majority within the same day. Since deregulation, we at Cox have invested more than 360 million dollars to make these improvements.

- And the cable industry invests in the communities we serve with people hours and hard dollars for worthwhile community causes which benefit both customers and non-customers alike. Cox Cable contributed more than 21 million in-kind and hard dollars to our communities in 1990 alone.

Mr. Chairman, and members of this Subcommittee, these are but a few of the things we have been able to do for our customers as a result of deregulation.

And there are so many more things that we plan to do, unless we become subject to rate regulation, particularly by city councils.

We can do so much more for America's fragile education system with industry-wide efforts like Cable in the Classroom. We can keep our country out front of the rest of the world with technological advancements like fiber optics, high definition television, interactive services, data transmission, home security, and much, much more. But the vitality of the cable industry depends upon a stable climate for further investment and future innovation.

As Chairman of Cox Enterprises, I cannot maintain Cox Cable's current commitment to state-of-the-art technology, excellence in customer service, quality programming, and community involvement if I am subject to local rate regulation – in our case, regulation by 111 different city and county bodies. With S.12, customers of Cox Cable, and every other well-managed cable company, would have to do without so many of the advancements this industry plans to introduce.

How can I with good conscience maintain our current level of capital investment in fiber optic plant and new services -- an amount exceeding $500 million dollars over the next five years -- if I am unable to budget and forecast in a rate-regulated environment?

The fact remains that we are already regulated at every level of government today: Congress and the FCC at the national level; at the state level in many instances through the PSC or PUC. And city and county governments continue to hold the ultimate lever – renewal of the existing cable franchise, or the granting of a second franchise to a competing operator in markets where there are instances of shoddy service or exorbitant rates.

Mr. Chairman, I urge you and members of this committee to consider all that I have said in my brief remarks.

So many companies in this industry, like Cox, are committed to the communities and moreover, the customers, we serve. Don't hamstring the American consumer by passing onerous rate regulatory legislation. Let annual industry-wide investment in programming and plant and equipment continue at the current two billion dollar rate in a stable climate for investment and innovation.

Legislation that retreats to the failed regulatory policies of the 1970's, when cable rates were regulated by local city councils, would destroy this industry's ability to innovate, improve, and maintain the level of service it now provides to its customers – and would thereby discourage management, like me, from making further investment.

Thank you for your time and this opportunity to present my views to you. I look forward to answering any questions you may have.

Senator INOUYE. Thank you very much.

Before I call upon Mr. Turner, may I commend you for the extraordinary coverage of the Gulf war by CNN. Mr. Turner.

STATEMENT OF R.E. "TED" TURNER, PRESIDENT AND CHAIRMAN OF THE BOARD, TURNER BROADCASTING SYSTEM, INC., ATLANTA, GA

Mr. TURNER. Thank you, Mr. Chairman.

Members of this Communications Subcommittee, you know who I am, Ted Turner of Turner Broadcasting. I appreciate this chance to offer our company's views on the cable television reregulation.

We realize that there is a real public concern with cable rates and customer service in some areas. We also know this committee has worked hard on cable legislation last year, and that many of our industry's best friends in Congress believe legislative action is still necessary.

We strongly recommend against reregulation legislation because we believe consumers will lose more from diminished program quality than they can possibly gain in reduced prices.

Let me briefly make four points. First, at around $20 a month, basic cable is not expensive, and to succeed commercially it must remain inexpensive. Even assuming that a major regulatory effort could somewhat reduce the basic cable price, the potential per-subscriber savings have to be small compared to the large amount of Federal and municipal time and energy involved.

Second, basic cable as we know it today is new and fragile. Deregulation is fueling major improvements in expansion of cable plants, including the installation of fiber optics, and enabling basic cable networks, for the first time, to offer significant amounts of original programming.

Since the cable act took full effect in January 1987, total programming spending by basic cable networks and spending on original programming have increased more than 2.5 times. The charts accompany my written testimony.

And in 1990, cable systems spent nearly $1 billion on rebuilding and upgrading plants, more than 70 percent above the 1986 amount. History demonstrates that reregulation threatens both the cable operators' incentive to upgrade programming and plant and the willingness of capital markets to fund that expansion.

Third, in most communities, basic cable receives strong competition from broadcasting, so that regulation is unjustified. In 1990, local broadcast stations had a 70 percent share of all television viewing in the United States, and basic cable, including super stations had a 24 percent share.

Customers find basic cable value, but the free availability of broadcast stations which receive over two- thirds of total viewing, does provide serious competition.

While basic cable's share of viewing has doubled since the enactment of the cable act, during this period, viewing of independent broadcasters and public television also increased, and the independent broadcaster and public television shares of total viewing remain constant.

On a national basis, the entire increase in basic cable viewership has come from the affiliates of the three broadcast networks, but they still have half of all viewing. Therefore, cable deregulation has strengthened, not weakened the competition.

Fourth, while it is true that basic cable prices have increased above the inflation rate since deregulation, these increases have been accompanied by dramatic improvement in the number and quality of basic cable networks.

At Turner Broadcasting, for example, CNN's news programming budget has grown from $74 million in 1986, to $145 million in 1990. Our budgets for entertainment programming have grown from $153 million to $551 million, and we have launched a whole new network, Turner Network Television, which now serves nearly 53 million subscribers.

Basic cable is much better, and a much better value today than when deregulation began. That is why the viewing of basic cable has doubled since the cable act was passed in 1984, and the number of people subscribing to cable during this time of increasing programming and rates has increased from 40 percent to 60 percent of all U.S. households.

I know that most members of Congress are pleased with the improvements in basic cable networks. As cable programmers, we at TBS have to make the point to you, as strongly as we can, that our future in the basic cable programming business is very much at stake here.

Almost every one of the smaller provisions of the bills before this committee, the tiering incentives; rate regulation; the must-carry rules, which I worked very hard personally to get struck down because they were discriminatory; favorable programming prices and turns for cable competitors, has a direct and adverse impact on basic programming.

However friendly the intent, it is unrealistic to expect that reregulation would not hurt the quality of basic cable and hurt the cable networks.

Mr. Chairman, thank you for allowing me to make my position known today.

[The statement and questions and answers follow:]

STATEMENT OF
R. E. "TED" TURNER
CHAIRMAN OF THE BOARD AND PRESIDENT
TURNER BROADCASTING SYSTEM, INC.

BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

MARCH 14, 1991

Mr. Chairman and members of the Communications Subcommittee, I am Ted Turner, Chairman of the Board and President of Turner Broadcasting System, Inc. I appreciate this chance to offer our company's views on cable television reregulation.

We realize that there is real public concern with cable rates and customer service. We also know this Committee worked hard on cable legislation last year, and that many of our industry's best friends in Congress believe legislative action this year may be necessary. Still, we strongly recommend against reregulation legislation, because we believe consumers will lose more from diminished program quality than they can possibly gain in reduced prices. Let me briefly make four points.

FIRST, at around $20 a month basic cable is not expensive, and to succeed commercially it must remain inexpensive. Even assuming that a major regulatory effort could somewhat reduce the basic cable price, the potential per-subscriber savings have to be small compared to the large amount of federal and municipal time and energy involved.

SECOND, basic cable as we know it today is new and fragile. Deregulation is fueling major improvements and expansion of cable plant (including installation of fiberoptics), and enabling basic cable networks for the first time to offer significant amounts of original programming. Since the Cable Act took full effect in January 1987, total program spending by basic cable networks, and spending on original programming, have increased more than two and one-half times. (See Chart 1 supplied for the record.) And in 1990 cable systems spent nearly $1 billion on rebuilding and upgrading plant, more than 70 percent above the 1986 amount. (See Chart 2.) History demonstrates that reregulation threatens both the cable operators' incentive to upgrade programming and plant and the willingness of capital markets to fund expansion.

THIRD, in most communities basic cable receives strong competition from broadcasting, so that regulation is unjustified. In 1990 local broadcast stations had a 70 share of all television viewing in the United States, and basic cable (including superstations) had a 24 share. Consumers find basic cable valuable, but the free availability of broadcast stations which receive over two thirds of total viewing does provide competition.

While basic cable's share of viewing has doubled since enactment of the Cable Act, during this period viewing of independent broadcasters and public television increased, and the independent broadcaster and public television shares of total viewing remained constant (see Charts 3 and 4). On a national basis, the entire increase in basic cable viewership has come from affiliates of the three broadcast networks, which still have half of all viewing. Therefore cable deregulation has strengthened, not weakened, competition.

FOURTH, while it is true that basic cable prices have increased above the inflation rate since deregulation, these increases have been accompanied by dramatic improvement in the number and quality of basic cable networks. At TBS for example, CNN's news programming budget has grown from $74 million in 1986 to $145 million in 1990. Our budgets for entertainment programming have grown from $153 million to $551 million, and we have launched a new network, TNT, with nearly 53 million subscribers. Basic cable is much better, and a much better value, today than when deregulation began. That is why viewing of basic cable has doubled since the Cable Act was passed in 1984.

I know that most Members of Congress are pleased with the improvements in basic cable networks. As cable programmers, we at TBS have to make the point to you, as strongly as we can, that the future of basic cable programming is very much at stake here. Almost every provision of the bills before this Committee -- tiering incentives, rate regulation, must carry, favorable programming prices and terms for cable's competitors -- has a direct and adverse impact on basic programming. However friendly the intent, it is unrealistic to expect that reregulation would not hurt the quality of basic cable.

Mr. Chairman, thank you again for this chance to testify; I look forward to the Committee's questions.

CHART 1

BASIC CABLE NETWORK EXPENDITURES FOR PROGRAMMING (millions)*/

	1986	1987	1988	1989	1990
ALL PROGRAMMING	484	551	747	999	1,283
ORIGINAL PROGRAMMING**/	272	325	402	541	693

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*/ Source: Paul Kagan Associates, Inc., Cable TV Programming, August 31, 1990, p. 2.

**/ Includes in-house productions, original productions, and sports rights.

CHART 2

CABLE CONSTRUCTION EXPENDITURES (millions)

	1986	1987	1988	1989	1990	TOTAL 1986-1990	%CHANGE 1986-1990
EXPENDITURES TO REBUILD OR UPGRADE PLANT	557	742	729	914	965	3,907	+73.2%
ALL CONSTRUCTION, INCLUDING NEW BUILDS	967	1,320	1,517	1,550	1,501	6,855	+55.2%

Source: Paul Kagan Associates, Inc., Cable Television Technology, February 28, 1990, p. 4.

CHART 3

SHARE OF TOTAL U.S. VIEWING BY INDUSTRY SEGMENT

	1984	1985	1986	1987	1988	1989	1990
NETWORK AFFILIATE	64.5	62.5	62.5	59.1	56.3	53.9	51.2
INDEPENDENT	14.7	14.7	15.1	15.3	15.7	14.7	15.1
PBS	3.0	3.2	3.4	3.6	3.2	3.3	3.3
PAY	5.6	6.0	5.0	6.0	6.6	6.4	6.4
BASIC CABLE[*]	12.2	13.6	14.0	16.0	18.2	21.7	24.0

Compiled by TBS Research from monthly A.C. Nielsen data (Cable Status Reports). Shares adjusted to equal 100%.

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[*] Includes superstations

CHART 4

AVERAGE VIEWING TO INDUSTRY SEGMENTS
HOMES (000), MON-SUN 24 HOURS

	1984	1985	1986	1987	1988	1989	1990
NETWORK AFFILIATE	17,002	16,706	16,848	15,980	15,699	15,282	14,512
INDEPENDENT	3,872	3,921	4,061	4,127	4,371	4,184	4,252
PBS	842	852	950	966	892	910	924
PAY	1,431	1,619	1,382	1,580	1,784	1,819	1,849
BASIC CABLE*/	3,198	3,579	3,715	4,302	4,995	6,095	6,840

CHART 5

AVERAGE VIEWING TO TURNER NETWORKS
HOMES (000), MON-SUN 24-HOURS

	1984	1985	1986	1987	1988	1989	1990
TBS SUPERSTATION	664	686	654	652	797	792	840
TNT						231	439
CNN	195	234	245	315	283	335	391
HLN	54	68	94	97	121	143	153
TURNER TOTAL	913	988	993	1,064	1,201	1,501	1,823

Source: TBS Research from A.C. Nielsen Cable Status Reports and ratings for Turner Networks.

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*/ Includes superstations

QUESTION OF SENATOR PRESSLER AND THE ANSWER THERETO

Question. I am concerned that alternative over-the-air programmers that compete with a program owned by a cable system are denied access to that cable system's subscribers. One example given to me, is where the Home Shopping Network is broadcast in markets served by TCI and Comcast and owned cable systems. Can you tell me whether TCI and Comcast have denied access to Home Shopping Network to avoid competition with their own program, Quality Value Channel?

Answer. Senator Pressler, I have no specific knowledge of either TCI's or Comcast's dealings with Home Shopping Network. But, virtually every broadcast station with significant viewership is carried by its local cable systems. Broadcast stations are carried even though must carry rules have been struck down twice by the courts. The cable bill before this Committee would reimpose must carry rules and we are opposed to that. I see no reason why Home Shopping Network should have preference over CNN merely because it's signal is available over-the-air.

Senator INOUYE. Thank you very much, Mr. Turner.

Mr. Kennedy, your company has substantial investments in both cable and broadcast properties. When you compare the marketplace and the regulatory circumstances under which the cable and broadcast systems operate, do you find any imbalance?

Mr. KENNEDY. Well, I guess it depends on who you are talking to. We all want our own advantage. The broadcasters, for a long time, were primarily concerned about being carried by their local cable system, and that is beginning to change.

The cable system, on the other hand, is constantly looking for the best programming for their consumers. So there are daily issues that, where broadcast and cable meet and can agree, and that is true with our company too.

I do not find imbalances in regulations though, they are more in day-to-day operations.

Senator INOUYE. What is your position on must-carry and retransmission consent?

Mr. KENNEDY. Well, must-carry is really a non-issue to me. As I said, every decent cable company in America tries to provide the programming for their customers that their customers want, and their customers want the over-the-air television signals. So it is prudent for all cable systems to provide that. We have never had a problem with must-carry within any of our television stations.

The early history of cable, broadcast stations wanted must-carry. Now, as Ted testified earlier, some of the broadcasters are saying that since 70 percent of the viewing or 60 percent of the viewing, whatever the number might be, on a cable system, is of over-the-air television stations. Why could not that cable system pay the broadcaster for the right to distribute that?

Well, if that is to occur, I think that broadcasters have to realize that cable companies should then have a choice. They should not be forced to pay for everything. They should be compelled to pay for the programming that they want.

In other words, the strong local signals in a community will be carried and the weak ones will not.

Senator INOUYE. Mr. Kennedy, you used a very interesting adjective. You stated, every decent cable operator.

What percentage of our cable operators are less than decent?

Mr. KENNEDY. I do not know.

Mr. MOONEY. Insignificant number.

Senator INOUYE. If Congress were to adopt a proposal that permitted broadcasters to negotiate with cable systems for carriage, would this have an impact upon rates charged to subscribers, Mr. Turner?

Mr. TURNER. Are you talking to me?

Senator INOUYE. Yes.

Mr. TURNER. I really do not know. But it makes good logical sense that if the cable systems have to pay more for programming, they have to pass the cost on.

I do not think that cable systems should pay for local broadcast signals because the local broadcasters when they got their licenses from the FCC, got a license to broadcast and that was what they received. They did not get a license to charge cable operators for the programming. It is a big change in the whole system.

Senator INOUYE. Mr. Mooney, the cable act contains a provision providing for leased access to cable systems by programmers, and according to information we have, there has never been a lease access.

And we checked out on this, and we have been told that when they attempted to lease channels from cable systems, they found the prices to be prohibitively high. Any comments?

Mr. MOONEY. Yes, Mr. Chairman, I do not think that it is quite accurate to say that there have been no instances of leased access. I think there have been some, admittedly very few.

I think that the cable act does provide remedies for people who think that the price is too high, they can go to the FCC for one, and I think that under certain circumstances they also have the option to go to court.

But to the degree that there have been very few leased access arrangements I think is due, not to resistance on the part of the cable act, but to the fact that the economics of the cable business really do not lend themselves terribly well to leased access.

In more instances, it is the—as a matter of fact, in virtually all instances, it is the cable operator who pays the programmer. The money is moving from the operator to the programmer, not from the programmer to the operator.

And I really cannot think of any cable network offhand whose economics, except for Home Shopping, would run the other way. So leased access in that sense may be a misapplied, be a device that is being misapplied to this particular medium.

Senator INOUYE. Thank you.

Senator Exon?

Senator EXON. Mr. Chairman, thank you very much.

Mr. Turner, let me ask you this question, we talk about competition all the time. We had testimony from two mayors that indicated that there were monopolies in Kentucky, Owensboro, KY, I believe it was and Newark, NJ.

If a second or third competitor in the cable industry came into Owensboro or Newark, New Jersey, and came to you as the owner of certainly many of the star programs on cable television today, would there be any question but what those competitors that would be trying to enter a market would be able to purchase from you CNN and Headline News and some of your other programs? Any prohibition at all?

Mr. TURNER. As far as TBS superstation is concerned, CNN and Headline News, if his credit was good, we would sell those three services to him.

If the previous operator that was already there had signed up for TNT, during the first year, during the term that we gave exclusivity, program exclusivity, then that service would not be available.

But there are very few services that are in that category, and they were designed specifically so that cable would have some proprietary programming, just like the broadcasters have, that is proprietary to them.

But three of our four services would be available to another cable system.

Senator EXON. At the same rate——

Mr. TURNER. We do have some discounts for volume, but whatever those volume discounts, our rates are published. I could furnish you a copy of them, there is not a significant difference.

I think the very largest operators pay 20 percent less than the very smallest, and those would be the rates that would apply for a cable system.

Senator EXON. I do not mean to pry into your business pricing policies unnecessarily, but we are trying to get a gripe here on——

Mr. TURNER. That is quite all right. It is public information.

Senator EXON. Do I understand then that a large cable television operation, let us say they are in a city of 1 million people and they are the only cable television facility there, compared with a 100,000 population city, do those two cable operators pay the same price for the services that you render?

Mr. TURNER. For TNT, they pay on a straight per subscriber basis and there is no difference in what the largest systems pay and the smallest system pay. But on CNN and Headline News there is an overall volume discount similar to what we do with advertisers.

The biggest advertisers pay less than the smaller advertisers. That is a very common practice in all sorts of purchasing.

Senator EXON. It is based upon subscribers though, not on population?

Mr. TURNER. Right. That is what it is based on, what we received, volume discounts based on larger amounts of——

Senator EXON. How many people are buying the service monthly from that particular cable operator, is that the point?

Mr. TURNER. Well, we deal with the cable systems, so I hope I understand your question. We deal with the systems.

Senator EXON. What I am talking about, if I talk about a 1 million in one city and 100,000 in another, obviously the city with 1 million people are likely to have significantly more subscribers than the city with 100,000. That is what I am trying to get at.

Mr. TURNER. We do not operate it that way. We operate it based on the size of the cable company that we are doing business with. It does not vary from city to city. It varies from company to company, based on the size of the business that they are doing with us.

Senator EXON. Then what you are testifying to, so that I understand it, of three of the four of the basic services that your company offers, would be priced the same whether you had one or two new competitors come into Newark or whether they went to Owensboro, KY.

Is that right, there would not be any prohibition whatsoever or any disinclination because they would have to pay more?

Mr. TURNER. No, because the maximum amount of discount from the largest to the smallest is 20 percent.

Senator EXON. And if I understand you correctly then, the first, if I were in business in Owensboro, KY, and the first month's business I only had 100 subscribers and a year later I had 1,000 subscribers, does that cover the blanket charge for your service?

Mr. TURNER. Yes, sir. It is on a per subscriber basis. It works out to between 20 cents and 22 cents a month, depending on whether you carry Headline News as well.

We also have a discount, depending on how many of our services are carried. You save money if you carry all four of our services. That is also a standard discounting type of procedure.

Senator EXON. It is true that of the four services that you provide, how many of those services are customarily included in what we call basic cable?

Mr. TURNER. CNN is in 62 percent of all households, according to Nielsen; TNT is in 57 percent; TBS is in 61 percent; and Headline News is in 49 percent.

So there is about a 13 percent difference in carriage, between our most carried service which is CNN and our least carried service which is Headline News.

Senator EXON. Let me turn to you, if I could, Mr. Kennedy, for just a moment.

I have heard some of the concerns that we have today about service. I would say there was a recent article in the Omaha World Herald that showed a high percentage of favorability with the service that Cox is providing there in Omaha, NE.

We have to go vote now. Let me ask the question about basic service, and I think basic service, this term we play around with a great deal, may mean one thing in one location and something entirely different in another.

And the basic service that started out somewhere around $10 and $12 has now gone up, as I understand it, to in the neighborhood of $20 to $22.

Now, I am not trying to justify or not justify that, I am just saying, Cox is one of the biggies in this field. Do you feel that most of your competitors offer about the same programs or quality of programs in the basic cable rate?

Mr. KENNEDY. No. I think it varies all over the board, depending on the franchise that each franchising authority has granted the local operator.

In many cases, there is a wide variance between what is considered basic cable.

Senator EXON. My time is up, Mr. Chairman. I just say, therein lies a problem that we have here when we throw about these basic propositions, and basically I guess because of the monopoly conditions, for whatever reason they still are monopolies for the most part, sometimes I wonder if we should pay too much attention to what is basic.

Because ordinarily, and maybe sometime or all the time, we are not comparing apples to applies.

Mr. KENNEDY. That is true.

Senator INOUYE. I would like to apologize to all of you. We once again have a vote, and if you will just be patient with us, we will be back.

The committee will stand in recess for 10 minutes.

[Recess.]

Senator BREAUX (presiding). The committee will please come to order. We will go ahead and begin. I think that since I am here, I will go ahead and ask my questions now and the other senators will be here very, very shortly.

I guess to anybody on the panel who may want to field the first question. Thinking back to some of the previous questions to the mayor on this panel that we had, one bit of information we have is that cable rates rose about 13 percent last year, which is more than twice the rate of inflation and more than three times the level of increased experience during the time when cable was regulated.

It has been pointed out that comes on the heels of a 40 percent basic rate increase that consumers experienced during the first 3 years of cable deregulation. One of the next witnesses is going to make that allegation.

Senator Danforth talked about the little old 85-year-old grandmother who really felt that she had to have cable because it was part of her life that she was not willing to give up.

What is your response from the standpoint of why we do not need a bill that regulates rates? Either member of the panel might want to take a crack at it.

Mr. MOONEY. Let me try first. I think the facts as I understand them are that in 1987 and 1988, which were the first 2 years of deregulation, cable rates—basic rates—did go up at a rate which exceeded the inflation rate of the general economy.

Then—you have heard Mr. Turner make his point about the previous 14 years when we were held 72 points behind the CPI.

In 1989, which was the third year of deregulation, again according to the information as I recall it, rates leveled off within the overall inflation rate but then in 1990 again started to exceed it, and the reason for that is cost driven. It is driven by increased costs for programming, for our labor costs, in many communities our pole attachment costs—in other words by costs which themselves increased the general rate of inflation.

Senator BREAUX. That is a point I would like to follow up. I have never seen a comparison. We talk about the rates for cable services going up 40 percent. Mr. Turner, you talked about your costs in programming going up since cable has been deregulated. Is there anywhere a comparison? We talk about how much rates have gone up. Is there any comparison of how much cable costs have gone up?

Everything that you have mentioned, Mr. Mooney and also Mr. Turner mentioned, are how much more programming costs from the time cable was deregulated until now. Is that a fair comparison? I mean, has your cost gone up 40 percent in some areas, or less, or more than that? Cab anybody take a shot at that?

Mr. KENNEDY. I have some numbers for our costs, Senator, and from 1986 to 1990, our weighted basic rate went up 38.9 percent, and our basic program fees went up 178.2 percent.

Senator BREAUX. That is something I think the record ought to clearly show. I was impressed by—I guess Mr. Mooney, you had in one of your statements that for about 50 cents a day, the cost of one issue of USA Today, cable provides most viewers with 34 or more channels of television 24-hours per day. I mean, I would think that the average person, when they complain about their cable costs going up whatever the percent is, when they do a comparison of how much they are paying for one newspaper a day, why is that message not out there?

Mr. MOONEY. Well, I think for one thing, most people are not economists and are not used to thinking in those terms. Moreover, I think most people probably have a longer memory for what costs of this and that used to be than they do for what services used to be, and while our retail prices have not been constant over the last 4 or 5 years, neither, of course, has been the service we are providing.

But there is where you reach the importance of the statistic which was mentioned earlier, to the effect that if you consider the number of channels we offer now, the cost per channel to the consumer has not increased significantly, and that is to say nothing, of course, about the quality of the programming, which I think most television critics today is light years ahead of what it was 6 or 7 years ago.

Senator BREAUX. What about the statistics that show that where there is competition, either where there is another cable system—and 53 communities have maybe more than one cable system—that the prices have increased substantially less and the cost of the basic service is substantially less than it is when you have only one cable system serving a community?

Mr. MOONEY. In most of the places that I am familiar with where you have had two systems operating, they have both been operating there for quite a long time, and one would assume from that that their capital costs—their original nut—is a lot less than other people's. I believe that is the case, for example, in the frequently cited Pennsylvania systems, which have been owned by the same families I think for over 20, or maybe even 30, years.

Senator BREAUX. A final point is that I note that some cable services or companies look like they are pretty much getting into providing some telephone services with some of the new coaxial cables that will be utilized by cable companies now for the first time, that that will give me the ability to do telephone services as well as the video programming.

If it is all right for cable companies to get into providing telephone services, what is the objection for telephone companies getting into the business of providing cable services?

Mr. MOONEY. Two reasons, really—two comments on that. The first is that we really do not know that PCN networks will work or will be economical. We are not even yet in the experimental stage, although I know that Mr. Kennedy's company has applied for a license from the FCC to conduct experiments and intends to spend some money seeing if there is something there. So at this point, it is much too speculative, I think, to even consider regulatory changes. It may get to the point where you want to consider them, but certainly not yet.

Second, the nature of the monopoly business that the telephone companies have, where they are offering what is, in fact, a necessity service to almost 100 percent of the population, not only in terms of residential customers but business customers as well, and therefore have this captive customer base, who they can bill for their costs in entry into other businesses, is the real difference between them and us.

If we ever get into a situation where we have got 100 percent penetration of homes past—right now we only have about 60 percent. 40 percent of the people who can take cable do not take it. If we ever get into that position where cable is generally regarded by the population as a necessity, as witness the fact that they all take it, then maybe there would not be much difference.

But today, the economic basis of these two industries is very different, and it is really, I think, not possible to make legitimate comparisons between them.

Senator BREAUX. Thank you, Mr. Chairman.

Senator INOUYE (presiding). Senator Packwood?

Senator PACKWOOD. Thank you, Mr. Chairman.

Let me address this first to Mr. Kennedy, but Mr. Turner and Mr. Mooney can answer if they want. One of the earlier questions got into the retransmission issue and the must- carry issue, and you said well, any good operators are going to operate to carry all the local stations anyway, because your customers want the local stations, and they especially want the local news, and you are going to carry them or they are not going to watch your channel.

Then you, I thought, said well, we would not mind bargaining to pay for it if they would realize that there might be some weak stations we therefore would not buy. Do I correctly paraphrase what you said?

Mr. KENNEDY. Well, yes. If the broadcasters are going to insist upon being paid for consent to carry their signal, then they are going to have to—some of the smaller fellows are going to have to realize that people are not going to be willing to pay for a station that very, very few people watch.

Senator PACKWOOD. Well, are you willing, at least as Cox Communication, to say that you would be willing to enter into that deal, and so long as there is no must-carry you would be willing to pay for what you did carry?

Mr. KENNEDY. Not at this time, no, I am not willing to say that.

Senator PACKWOOD. Why is that?

Mr. KENNEDY. Well, I think there is still an awful lot of negotiations that have to be conducted, and frankly I think it would be unfair to some of the smaller television stations.

Senator PACKWOOD. You have lost me, now, on your logic. Unfair in the sense they might not get carried, and you are worried about them?

Mr. KENNEDY. Yes, that would be something I would worry about, plus no matter what you do you are going to increase the cost of being in the cable business, so what that will mean will be either a higher rate to the customer or a reduction in viewing options.

Senator PACKWOOD. Yes, but that argues against any copyright law. Books would be cheaper if we did not have to pay copyrights on them, and consumers would be better off. Are you suggesting we get rid of all——

Mr. KENNEDY. No, I am not.

Senator PACKWOOD. Well, I do not follow your logic, then. We can make movies cheaper, too, if we do not have to pay copyright fees on them. People can see them for a lot cheaper price if we do not pay Hollywood. We will just copy them.

Mr. KENNEDY. I am not—that is not the point. The concern on this issue that I am trying to address is that the small, independent station that just gets started with very limited resources and very limited viewership is now generally carried. If we go to a position where we have to have consent from a broadcast station to carry that on a cable system, I am not sure that cable systems, ours included, would be willing to pay much money to carry some of the very small stations.

Senator PACKWOOD. I think you are probably right, and if the broadcasters want a situation where it is not must-carry, but if you do carry pay, I do not think they can say well, must-carry, but no one will pay for it, but pay if people want to carry it. I mean, that is not a market system, either.

Mr. KENNEDY. Well, that is both sides of the fence.

Senator PACKWOOD. Well now, let me ask Mr. Turner, because I saw those wonderful figures where during the Persian Gulf War you had, what, 56 or 57 percent of the audience, and the networks all had about 13 or 14 percent apiece.

Mr. TURNER. That was only the news programming, and that was only within the cable universe, but at the beginning of the ground war and the beginning of the air war we did beat the networks for a day or two within our universe, and actually for a day or two we beat them in total, but unfortunately when the war was over—I am glad the war is over, obviously. Let me make that very clear.

Our ratings have gone down dramatically, because quite frankly people would rather watch entertainment than news on a normal day. At least, they get by with a little bit of news and lots of entertainment.

Senator PACKWOOD. But now, while you were a hot property, you transmitted your signals by satellite from the Persian Gulf, but no one can take—those are copyrighted signals, and nobody can take them off the air and retransmit them, and as I understand it, cable cannot take—correct me if I am wrong, Mr. Mooney. Cable cannot take signals off the air, the satellite signals from the networks. Those are copyrighted, also.

Mr. MOONEY. We cannot take their feeds, no.

Senator PACKWOOD. Right. You can only take the local transmission. All right. So they cannot take Mr. Turner's feed going out.

Now, assuming it was technically possible—and I do not think it is, but assuming it was, however, as you are feeding out to your local cable customers, I will bet you anything a lot of local network affiliates wish they could have taken your signal and put it on.

Mr. TURNER. A lot of them did.

Senator PACKWOOD. Not legally. They have to pay you for it, do they not?

Mr. TURNER. Some paid. There were some that just did it anyway, and that has happened before.

Senator PACKWOOD. They are supposed to pay, though.

Mr. TURNER. Right. Then there were about 30 stations that signed up the second day of the war to get the coverage from then on.

Senator PACKWOOD. Now, if they can take your local cable transmission but they are supposed to pay you for it—I realize some of them may have pirated it, but they are supposed to pay—why should you be able to take their local transmission signal for nothing?

Mr. TURNER. Well, I do not. I do not take their local transmission signal.

Senator PACKWOOD. I do not mean you, I mean a local cable operator.

Mr. TURNER. Why should a local cable—well, first of all, when a——

Senator PACKWOOD. The local station cannot take the local cable operator's transmission for nothing, so why should the cable operator be able to take the local NBC affiliates?

Mr. TURNER. The main reason is because the broadcasters wanted it. When the cable industry got started years ago, the broadcast industry lobbied—all you have to do is go back and look at the records.

Senator PACKWOOD. Oh, I remember that.

Mr. TURNER. The broadcasters screamed that they had to be on the cable systems because it improved their transmission.

Senator PACKWOOD. I understand that.

Mr. TURNER. They are already available. With a little AB switch—in fact, if you are in a situation like I am where I live primarily in a rural area, there is no cable available to me, so I have to have a satellite dish, which—there are 3 million people in my category, and I have to have an outside antenna as well.

I get the cable programming off the satellite, and I get the local broadcasters over the antenna, and I get an AB switch. So do a lot of people in the State of Tennessee, particularly in more rural areas. So it is no big deal. The broadcaster's signals are over the air, available for free, and the cable systems just enhance their signal. That is all they do, and the broadcasters wanted it that way.

Senator PACKWOOD. I understand the old argument, and I remember when they insisted on the must-carry, and I remember how much they wanted you to carry their signals for nothing. They were happy to have you carry them. This is 1991. Now, they want you to pay to carry them.

Mr. TURNER. Well, there is no must-carry now, and I think that is right. The broadcasters were really concerned that they were going to get dropped after the must-carry rule went away, but there were almost no cases. There were very, very few cases where broadcasters were dropped.

But I really think that if broadcasters were able to charge cable systems, since broadcast signals are already available over the air I think that the cable operators for the most part would let the subscribers have an AB switch and let them be reached off the air with a poorer signal, because you have got a poorer quality signal, usually, with over-the-air broadcasting, particularly on UHF, and the only broadcast licenses I ever had were for UHF stations.

Senator PACKWOOD. I want to come back to the reverse, now. You do not want these local stations pirating your signal on the Persian Gulf, but they will broadcast them to people that have no cable.

Mr. TURNER. That is right, but I do make it available to them.

Senator PACKWOOD. If they will pay for it.

Mr. TURNER. That is right.

Senator PACKWOOD. That is all I am asking, and that is fine. Why should you not pay for their signal?

Mr. TURNER. Well, if I was going to use their signal—and in fact, part of our arrangement with local stations all over the country, and we have over 200 of them, is that they furnish us news too, and we do pay them for that news.

We pay them in reduced fees. We have an affiliate relationship with, mostly with network-affiliated stations around the country, where we can use their footage of local events if we deem that they are of national interest, and they can use our national and international stories if they deem they are of interest.

But they pay us a little bit of money, usually it is not very much. It is mostly an exchange agreement, because we would use less of their material during the year than they would use of ours.

Senator PACKWOOD. All right.

Mr. Mooney, let me ask you, these exclusive arrangements, the programming and the showing, is there any other industry that is subject to those? I know Hollywood used to be, but I do not think that is enforced anymore.

Mr. MOONEY. Yes. And in the broadcasting industry, broadcasting networks always have exclusive arrangements with their affiliates. The NBC station here is the only station which can distribute NBC programming in this area.

Senator PACKWOOD. Yes. Put it the other way, but is there any prohibition on exclusive arrangements in any other industries?

Mr. MOONEY. Not that I am aware of.

Senator PACKWOOD. I mean, of——

Mr. MOONEY. Except as provided by the overall antitrust laws.

Senator PACKWOOD. Oh, yes.

Mr. MOONEY. To which, of course, we are subject as well.

Senator PACKWOOD. But a publishing company can own a bookstore or could buy B. Daltons if they want to and own a big bookstore.

The movie companies can now own theaters. They did not used to be able to, but they are now allowed to produce movies and show them in their own theaters under exclusive showing arrangements.

Mr. MOONEY. That is correct.

Senator PACKWOOD. If we were to prohibit cable programming or limit cable programming and cable ownership, it would be rather unique to the entertainment industry.

Mr. MOONEY. Well, let me yield to Mr. Turner, who probably knows more about this than I do, but I think it would not only be unique, it would probably also be the end of new cable networks because in many instances the cable operator is the rational source of the financing, through the commitment to carry and to pay for the service.

Ted, you may have——

Mr. TURNER. There are limitations in broadcasting. You can only own stations that reach a certain percentage of U.S. homes. It used to be by the number of stations, now it is the percentage of audience, and that is true of radio as well, or at least there used to be limitations on radio stations.

Senator PACKWOOD. However, the networks do manage to have stations in most of the biggest markets in the town that they own in the country.

Tell me about renewal of franchises, and service complaints. Do cities ever not renew your franchises and do you sue them and what happens?

Mr. MOONEY. They sometimes do not renew our franchises and in every court case I am familiar with involving a renewal dispute, the city has won.

Senator PACKWOOD. You have not won any of them?

Mr. MOONEY. We have not won any of them, which I think tells you something about the adequacy of the renewal——

Senator PACKWOOD. Well, just out of curiosity, would——

Mr. MOONEY. The problem I have with S. 12 is that it would modify the renewal provisions of the cable act in such a way as to reinforce the habit of cities of granting only one franchise.

I mean, those provisions of the bill assume that there can only be one cable operator and in order to have guy number two come in, you got to first throw guy number one out. Then there is another provision in the bill which would protect the city from having to pay damages if guy number two sued, saying that the denial of a license to him was a First Amendment violation.

Senator PACKWOOD. Let me ask this question. Al, maybe you know. How big a market is Owensboro? You said Chattanooga is close to it. Does anybody know?

Senator GORE. Tennessee is close to it.

Mr. TURNER. He said about 18,000 subscribers and he said he had 78 percent penetration. So it would be about 25,000 households in the market.

Senator PACKWOOD. So it would be a market that a cable company would like to serve? It is a big enough market to justify it?

Mr. KENNEDY. Absolutely.

Senator PACKWOOD. Then it would seem to me that Owensboro would have a whale of a lock, this franchise is up this year. It is a 20-year franchise. I would not think the cable company would be in a great bargaining position at the moment with Owensboro, would it?

Mr. MOONEY. No, especially since under the cable act, Owensboro is very much in a position to demand all sorts of concessions having to do with the plant, what the system ought to look like, what we sometimes perhaps too jokingly call bells and whistle services, not to mention financial concessions, and also, for that matter, customer service requirements.

So I think that whenever you have a renewal situation, the city which controls all of those things, as well as the term of the new license is in a pretty good spot.

Senator GORE. Would you yield on this particular point?

Senator PACKWOOD. Yes. In fact, I am done with my questions. Go ahead.

Senator GORE. How many franchise renewals have been denied since the 1984 act passed?

Mr. MOONEY. I do not have a number in my head.

Senator GORE. Could you guess?

Mr. MOONEY. I can provide, I will attempt to provide an answer to you. I would estimate, not that many.

Senator GORE. Could you count them on the fingers of one hand?

Mr. MOONEY. Probably not, there would be quite a few more than that.

Senator GORE. Are there not provisions in the act that tilt the process toward renewal for the incumbent franchise- holder?

Mr. MOONEY. No, I do not think so. What the act is heavy on is due process. It makes the city go about this in an orderly way, with a record, with hearings on the record, with the opportunity to offer evidence, sets up standards to guide the city in making its judgment, and then allows the cable operator, if he thinks he has been wronged, to seek relief before a dispassionate Federal judge.

Senator GORE. Well, you are an able advocate, Mr. Mooney, but my understanding of the act is there is an absolutely presumption in favor of renewal. We will provide the legal wording of the provision for the record, along with the numbers.

But the cities contend, I think with justification, that the way the law tilts the process, the remedy available to cities in the renewal process is quite limited.

But we will provide more information for the record on that, and you are most welcome to as well.

I would like to go into my questions now. But I would like to comment now briefly, let me comment on what was said about exclusive distribution rights in other parts of the entertainment industry.

If this a new vote? We are having quite a day here, I must say.

Mr. Chairman, I would like to get my questions in and go over and vote, if that is possible.

Senator BURNS. Well, I would like to get mine in so I could catch a 5:15 plane.

Senator GORE. Well, I believe you have had a round, have you not?

Senator BURNS. No, I have not had a shot at these three.

Senator GORE. Well, neither have I.

Let me proceed if I could, because I have got something to go to and I am next on the list and I beg your indulgence.

The exclusive distribution arrangement with a network affiliate, for example, is very different in its implications because if NBC restricts its signal to one affiliate here in Washington, there is a CBS affiliate. There is an ABC affiliate. There are other broadcasters available in that market.

If there is only one cable company and the programmers have exclusive arrangements with that one cable company, then that further locks in the monopoly characteristic of that particular market.

Let me move quickly to the questions that I wanted to ask. First of all, Mr. Turner, I wanted to second the sentiments expressed by Chairman Inouye at the start of the hearing, and I hear this from my constituents constantly, the tremendous enthusiasm for the public-spiritedness that CNN demonstrated in just really going all out to give the country the kind of coverage that it did during the beginning of the war, during all phases of it really, the troops coming home.

And I would also like to mention, if I could, Mr. Chairman, that I have been involved in the effort to deal with problems affecting the global environment, and of all communicators, broadcasters, whatever, Ted Turner has been really, by all odds, the one who steps up to bat and says, yes, this is important and we are going to do the job.

And I would just like to say that for the record. And I particularly want to say it for the record, because now I want to ask you some questions about these issues here.

You said that you are a satellite dish owner and that that is the only way you can get the signal in the place where you like to spend most of your time. I heard an interesting story from a dish owner who lives outside Washington, DC.

He called up, he was unable to get TNT, your newest service on his satellite dish, and so he called up TNT and said, how can I get TNT?

And they said, well, we have an exclusive arrangement, you have to buy it from your cable company. Now cable is a natural competitor to the dish industry, I am sure you would agree with that.

So he called his cable company which told him that he could not buy it from the cable company because they refused to sell it to dish owners. That the only way he could buy TNT was to subscribe, to buy it from TNT. So he could not get it either coming or going.

That does not sound like very friendly treatment to satellite dish owners. Have you got any plans to open up TNT to competitive distribution, to satellite dish owners like the ones that live near you out in Wyoming?

Mr. TURNER. First of all, Senator, I would like to thank you for your other two comments.

And to deal with this, I said it earlier, but I think you were voting, that TNT is the only network that we gave cable exclusivity 2.5 years ago when we started. If a cable operator signed on within the first year, he got exclusivity for TNT.

And there was reverse exclusivity where home satellite dishes got a network that you could not get on cable. It is not up there anymore, but it was the Ecstasy Channel, cable operators would not offer it.

So it really worked both ways. They both had some exclusive programming. Everybody needs a little something exclusive. That is why we get married.

You know, we are all entitled to a few little things in life that are ours: our homes, our cars, our clothes.

Senator GORE. What was the question again?

Mr. TURNER. It was cranked up that way, it was started that way, and most cable operators do agree to make it available to satellite dish owners.

And if you would have your staff let me know, I will talk to the cable operator and make sure that gentleman outside of Washington gets TNT.

Senator GORE. Very good. This particular customer happens to——

Mr. TURNER. If he will pay for it.

Senator GORE. Happened to be, this particular customer happens to be the chief executive officer of the National Rural Telecommunications Cooperative.

Mr. TURNER. I do not care who he is.

I can get it for him.

Senator GORE. And of course, they have been given the run-around as a cooperative also.

Now let us say that a company wanted to start a new cable programming service, let us say a cable news service or a home shopping service. If one or two of the major MSO's say, TCI and Cablevision, refuse to carry that service, what would its chances be for survival?

Mr. TURNER. It is hard if you cannot get distribution. I know because I have worked for close to 20 years to get cable distribution. It is not easy and there are lots of people today that want to get in on the gravy and there is not room to accommodate them all.

It is kind of like, remember the story of Noah, you know, everybody laughed at him when he was building that ark, but when the rains started coming, the water started to rise, he did not have any room for them. He only had room for two of each of the animals, no more people.

That is basically what the problem is. Right now, there are more people who have ideas for channels than there is channel capacity. Now more and more channels have been added, but it is a good business now. The cable business is on a roll.

We worked real hard for it. It did not happen just overnight. It happened over a period of a lot of years, and a lot of people want to jump in on the bandwagon.

Senator GORE. Now Noah's arrangement, as I remember, was divinely sanctioned.

Mr. TURNER. I am not saying that we got divine guidance. You know, we kind of guided ourselves through this.

Senator GORE. And are keeping it to yourselves in the sense that, back to the question, if a new cable news service or a home shopping network tries to market its service and two MSO's, TCI and Cablevision say, well, we are not going to carry your service. Then they could not survive.

Mr. TURNER. That is not true. That is not true. And there is more than one cable shopping service, and I do not know who is carried by whom, but there are several of them out there.

Senator GORE. Now TCI owns part of—TCI and Cablevision own part of CNN, correct?

Mr. TURNER. That is right.

Senator GORE. Okay. Now if a new service is offered that would compete for CNN's audience, then TCI and Cablevision, as part owners of CNN, would have a financial interest in preventing that competition from being viable, correct?

Mr. TURNER. But there is a new news service. It is called CNBC. It is owned by NBC and General Electric, and TCI is carrying that service and they do not own any of it. So that just knocks that argument down because they are carrying it, it is a news service, and it is competitive with us.

Senator GORE. Does it have any restrictions on the kinds of news service it provides?

Mr. TURNER. I am not aware of them myself. I am not aware what their contracts are.

Senator GORE. Have you heard anything about that?

Mr. TURNER. I certainly worry about it a lot, but I have never seen the contract.

Senator GORE. We are good friends, and I do not want to ——

Mr. TURNER. I do not know. I really honestly do not know. If I knew, I would tell you obviously.

Senator GORE. You have heard——

Mr. TURNER. But I could find out. You have to summon John Malone and ask him to cough it up. He will be happy to show up.

I cannot do that.

Senator GORE. Well, we have found out actually already, and they were in essence shaken down. They were told that they had to change their format so as to avoid direct competition in that news market.

They also had to cough up $20 million for a moribund distribution arrangement, some transponder contracts. And it seemed to me that the circumstances made it clear that this was quite anti-competitive, and——

Mr. TURNER. But there are other instances that make it difficult for us to compete with other combinations. For instance, USA Network which is owned by Paramount and Universal, two of the movie studios, has a tremendous advantage because of all of the programming that they have. And Disney, which has the Disney Channel, feeds it their programming.

Those are vertically integrated services as well. And ABC, which owns ESPN, has a tremendous advantage over us in the acquisition of sports rights. And that is vertical integration.

Senator GORE. We have got another vote on the floor, so I am going to go and then come back. I hope you all are still here.

Senator PACKWOOD (presiding). Do you have any more questions of this panel?

Senator GORE. I do.

Senator PACKWOOD. Okay. I probably go for 10 minutes or 15 minutes.

Let me make a note here on something somebody just told me.

I apologize for not knowing the questions that were asked previously. Did anybody get into this new, two-pronged test for the standard of competitiveness? Not only the number of stations, but now the percentage of cable penetration?

Mr. MOONEY. Not yet.

Senator PACKWOOD. You may be the wrong group to ask this to. I do not understand the logic of it. I understand the competition. If you want to say, okay, instead of 3 stations there must be 6 or 10 stations. And if there is over that, then we will presume competition.

But I do not understanding saying there must be six stations, and if you happen to have penetration of over——

Mr. MOONEY. I do not want to get into defending the logic of it, because I do not understand the logic of it either.

If you have more than 50 percent penetration it may be simply as a result of providing good service, offering a good programming lineup and doing good marketing. There is nothing to say that above or below 50 percent, or for that matter any number arbitrarily chosen, is indicative of anything with respect to market power or competition.

I can understand the logic of the six signals because it stands to reason that the more broadcast signals you have in a given place, the more people might feel that they do not need to subscribe to cable to get TV.

But the other part of it, the penetration test, offers no ——

Senator PACKWOOD. Mr. Kennedy, let me come back to you again because I still do not quite follow the logic of this, do not must carry, but will pay. And your very encouraging sympathy for the small station that might not be carried. You do not want to enter into this? Okay, broadcasters, here is the deal. We will pay you to carry you, but we will negotiate it. If you want to charge us too much, we will not carry you. What is your reluctance to get into that?

Mr. KENNEDY. Well, I suppose as a broadcaster and with strong stations, I would be in a good position to enter into that kind of agreement. But I think it would totally shake up the broadcast system that we have now. And there are a lot of other considerations.

Senator PACKWOOD. Why would it? I mean, you carry these signals for nothing now. So the difference in the argument that Mr. Mooney was that if you had to pay to carry them, you would have to charge more because you have to pay.

But how, apart from that, would it shake up the broadcast system?

Mr. KENNEDY. It changes the whole notion of compulsory license.

Senator PACKWOOD. I am just not following.

Mr. KENNEDY. Well the compulsory license that says that cable operators—broadcasters broadcast their signal as a broadcast signal and cable has the right to pick that up and distribute it.

Senator PACKWOOD. But just awhile ago in your opening testimony, you said you would be willing to consider paying for it.

Mr. KENNEDY. I would be willing to consider it, yes. But I think there is a broad range of negotiations between cable and broadcasting that would have to go on, not just the issue of paying.

Senator PACKWOOD. Then give me the pros and cons apart from the poor, small station in the remote area that maybe nobody will pay to cover. You have both over-the-air and cable stations, right?

Mr. KENNEDY. We do.

Senator PACKWOOD. All right. So you see if from both sides.

Mr. KENNEDY. I do.

Senator PACKWOOD. Tell me the pros and cons.

Mr. KENNEDY. Well, the pros for the broadcast stations are, it could be an additional source of revenue. The consideration for a consent might be the cable system leases another channel to the broadcast station, does promotion for them, a wide variety of different options. As a result, that would be a positive for the local broadcast stations.

A negative would be that it would cost the cable operator more money to distribute the same programming that he is distributing now. So he is faced with two choices, one, either charge more for that, or have limit the options.

Senator PACKWOOD. But anything that you carry that you pay for you have to charge more for. I mean, all the programming that a local cable station carries is not provided to them for nothing. They pay for a fair portion of it.

Mr. KENNEDY. I guess that flies in the face of the whole notion of free television.

Senator PACKWOOD. Free? Do you mean in the sense that you do not pay a subscription fee?

Mr. KENNEDY. That is right.

Senator PACKWOOD. Clearly when Mr. Turner said earlier, well if we have to pay to carry things, we will have to. And you said we will have to increase our price. The only difference is that on over-the-air television you pay more for the soap because the soap company has to pay to have their product carried on "free television." And they have got to charge someplace, they cannot eat that. They have to pass it along.

Mr. KENNEDY. Absolutely. There has got to be some freight for the railroad. And advertising is the freight for the broadcasters.

Mr. MOONEY. May I take a crack at that?

Senator PACKWOOD. Sure.

Mr. MOONEY. I think if you were going to invent these industries tomorrow morning and invent tomorrow morning their manner of providing service to the public, you might say that there is a kind of rough justice in the proposition that the cable operator ought to have to pay the local broadcaster for the privilege or retransmitting the signal.

But we are not writing on a blank slate here. There is a lot of history here. And for many years the broadcasting industry insisted that, as a matter of Federal law, cable systems should be required to carry all local broadcast signals free of charge. And the FCC enforced that.

People got used to seeing the broadcast stations and, as cable developed, the cable networks all on the same dial, seamlessly as it were and being able to switch from one to the other.

Now all of a sudden the broadcasters or at least some of them, by the way, the broadcasting industry so far as I can tell is split on this. The indy's still want must-carry, while the strong affiliates all of a sudden want to get paid. Some of the broadcasting industry now decides that the right thing for them to do is to start generating a revenue stream for this.

I think that whatever the theoretical free market attractions of that, you really have to question the standing of the broadcasters to show up at this point in history and all of a sudden want to get paid for the cable operators doing what they used to insist the cable operators as a matter of law and in which the customers got used to. Whereas, if you establish the system and have to get paid, the customer just ended up getting the same thing he always got, but would have to pay more for it.

And so I think sometimes history overcomes the logic, the free market logic of these kinds of claims.

Senator PACKWOOD. I live up by Cathedral. My cable station does not have to carry the Baltimore channels?

Mr. MOONEY. Does not have to, no.

Senator PACKWOOD. Does not have to.

Mr. MOONEY. And I cannot remember the hyphenated market rules as it applies to that. There were some anomalies, but for the most part if it is out of market, we have got to pay for it under Federal law.

Senator PACKWOOD. If it is what?

Mr. MOONEY. If it is out of market, out of town broadcast stations.

Senator PACKWOOD. Maybe Mr. Kennedy knows, is Baltimore out of market?

Mr. KENNEDY. I do not know.

Senator PACKWOOD. If you were a cable broadcaster in this area and you had to pay, would you buy the Baltimore affiliates when you can carry the Washington affiliates? Would you carry them both?

Mr. MOONEY. There is a matter there of program exclusivity.

Senator PACKWOOD. Cable does carry them both now, here. But if you had to pay, would you carry them both?

Mr. MOONEY. No.

Senator PACKWOOD. John, do have any questions?

Senator BREAUX. I am just wondering, has there been a political coup in my absence?

Senator PACKWOOD. Yes, but because of what I sense might be your position on this, you were not included in the coup.

Senator BREAUX. I have no questions. Thank you.

Senator PACKWOOD. Why don't we just take a hiatus until the Chair comes back.

[Recess.]

Senator BREAUX (presiding). If the committee would please come into order once again. We have more of our members back and I understand that Senator Danforth may have a couple of questions of this panel. We recognize Senator Danforth.

Senator DANFORTH. Mr. Chairman, thank you very much.

Let me ask you, all three of you, if you would agree that a cable company within a specific community is a monopoly.

Mr. TURNER. Could I answer that first?

Senator DANFORTH. Of course.

Mr. TURNER. Because I strongly disagree with that statement.

Senator DANFORTH. Why?

Mr. TURNER. First of all, there are the broadcast stations in that community which are going to get the bulk of the viewing even if there is cable. Secondly, there are VCR's and videotapes. And, third, if you do not like any of those and you do not like the local cable company, you can put up a satellite dish in your backyard and bypass the cable company.

You could also read books, go to ball games, go to movie theaters, et cetera, et cetera, et cetera. You could spend the night talking to your children or spending time with your wife. There are a lot of other good things to do than watch TV period.

Senator DANFORTH. That is right. By the same token, the competition, say, for an automobile company would be a horse, would it not?

Mr. TURNER. No, there are a lot of other things, a bicycle, for instance.

Senator DANFORTH. Yes.

Mr. TURNER. Which costs less and does not pollute the atmosphere. I ride a bike whenever I can.

Senator DANFORTH. Right. Well, that is one view. I mean, the question is, I think, an antitrust term as to what——

Mr. TURNER. There is also the bus.

Senator DANFORTH.—what is the relevant market. If you have a very expansive view of what people can do with their time, there is no doubt about that. But if you want a multichannel provider, it is a monopoly, is it not?

Mr. TURNER. It depends on how many television stations there are in the market. If there is only one station, cable is the only multichannel. But if there is the normal, one independent and three network stations, at least in a public broadcaster you have got six channels. That is multiple service.

Senator DANFORTH. What is your view, Mr. Mooney?

Mr. MOONEY. I agree with Mr. Turner. I would say that the TV set itself, in a market with a number of broadcast stations in it, is itself a multi-channel provider.

I said last year, before this committee, that I have sort of given up arguing whether, in pure economic terms, these things are monopolies or not. I think they certainly have some of the characteristics of monopolies in that cities typically allow only one license.

But the more relevant question, it seems to me, is that are there other things in the market that operate to constrain cable pricing and cable penetration. I think the answer to that almost always is yes, it is broadcasting.

Indeed, the FCC has had an open record on this for the last 18 months and the only economic studies which have been filed with the Commission say that the answer is yes and that it is broadcasting. And nothing has been filed on the other side in the way of proof.

Senator DANFORTH. That what?

Mr. MOONEY. That cable does not compete with broadcasting. And that to pick up where you started off, the relevant market is not just television. It is all television.

Senator DANFORTH. Well TCI is a major cable company, is it not?

Mr. MOONEY. Yes.

Senator DANFORTH. Is it the biggest?

Mr. MOONEY. It is the cable company serving the most subscribers, yes.

Senator DANFORTH. I know it serves Jefferson City and Cape Girardeau, which is the source of a lot of complaints that I get.

TCI filed a brief in the U.S. tax court on March 16, 1989. My understanding is that the issue in the case had to do with whether goodwill has any value in the company.

Just let me see, quoting one part of the brief, "Dr. Malone and Mr. Hostetler, businessmen who operate systems, agreed that a cable operator serving the city has a monopoly in the sense that customers desiring cable service will have no choice regarding the provider of that service. And again, there is no goodwill in a monopoly. Customers return not because of any sense of satisfaction with the monopolist, but rather because they have no other choice."

That is the position that TCI took in the Tax Court of the United States. They said we are a monopoly.

Mr. MOONEY. If that is their position, I disagree with them strongly. I suspect that if they did say that, the brief obviously was written by their tax lawyers rather than their communications lawyers.

Senator DANFORTH. It was filed on their behalf though. You do not have such a dim view of your members that you think that they would take one position in one forum and another in another?

Mr. MOONEY. Oh, no.

Senator DANFORTH. I did not think so. I do not have any other questions.

Senator BREAUX. Why do we not go ahead. Al said he wanted to ask some more questions.

Senator DANFORTH. And Senator Burns does too.

Mr. TURNER. Senator Burns is gone. He left for Kuwait. His plane left 5 minutes ago.

Senator DANFORTH. They have not left yet.

Mr. TURNER. Oh, he has not?

Senator DANFORTH. No.

Senator BREAUX. Let us have a brief recess, and we will try and find out who is coming back and who is not.

[Recess.]

Senator INOUYE (presiding). I apologize for this inconvenience, but that was the last vote. So we will not be interrupted. And I thank the panel very much.

Senator Gore and Senator Burns have several questions they would like to submit to all three of you for your consideration and response.

Thank you very much.

Mr. TURNER. Thank you.

Senator INOUYE. The third panel consists of the president of the National Association of Broadcasters, Mr. Edward O. Fritts, and the president of the Association of Independent Television Stations, Incorporated, Mr. James Hedlund. Mr. Fritts, welcome, sir.

STATEMENT OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. FRITTS. Thank you, Mr. Chairman.

As the great philosopher, Yogi Berra once said, it is deja-vu all over again. I think this stack of hearing records for the 101st Congress says it all.

You know the problem, we know the problem, and the American people know the problem. The cable industry is no longer a struggling infant and despite the best efforts of this committee, the video marketplace still needs a rebalancing act.

The only changes in the marketplace and political environments we described a year ago are that our problems are mounting even faster than we predicted. And frankly, the likelihood of meaningful solutions appears increasingly remote.

The only questions are: What will be done and who will do it? The administration appears to have shut the door on changes to the 1984 act, and instead favors some form of telco entry.

The cable industry has vowed to resist any changes. The FCC has an effective competition rulemaking under way, which is the equivalent of a bad joke, and that leaves you, the Congress.

Broadcasters believe in a system of mass media which has service to the public as its foundation. The Congress constantly tries to reinforce and add to the public interest obligation of broadcasters.

For more than 50 years, our country has enjoyed the fruits of that system. Today, that system and the service it provides the American public are in severe jeopardy.

In 1984 Congress granted the fledgling cable industry tools to make it grow, flourish and prosper. Now that industry is mature and successful. Much of that growth has been achieved by using the successful programming of the broadcast industry and now increasingly, that growth is directly at our expense.

So Congress is faced with a choice: either grant broadcasters the tools we need to survive in a significantly changing marketplace or accept the reality that in all likelihood, you will find yourselves presiding over the demise of free television as we know it today.

Mr. Chairman, instead of focusing on a cable reregulation act, we would suggest that you consider passing a marketplace improvements act of 1991.

Here is what we need. It is the prescription our board of directors adopted in January. First, broadcasters need access to their markets. Everyday that access diminishes thanks to the strangle-hold cable has over the American video marketplace. My friend, Jim Hedlund here will speak more about the need for carriage of local stations, but access to markets is essential.

Secondly, we need access to new technologies like high definition television. Now broadcasters may need additional spectrum and that is why we have endorsed your S. 218, the Spectrum Allocation bill, to free up spectrum for all commercial users.

But with cable standing as a gatekeeper, high definition television will happen for broadcasters and for viewers only if cable wants it to happen.

Third, broadcasters need what every other video competitor already has. That is the right to control the retransmission of our signal, which is our only commodity.

We need to have a voice in who carries our signals, and on what terms. Without that, little else will matter in the long run.

And finally, although we favor new pro-competitive ideas, we maintain that restrictions on telco entry into video and audio programming are needed. Fiber optics will bring us a great new world of technology in the future, but let us not mortgage that future by letting the monopoly telcos own the programming on the conduits they will control.

I think we have all learned that lesson the hard way with the cable model, and we do not need to replicate that for the telephone companies.

That is it, simply four principles which we believe need to be incorporated into law to give broadcasters a fighting chance to stay in business and to compete on equal terms.

We stand ready to work with your staff to craft specific proposals, but frankly, Mr. Chairman, we feel it is up to both of us. We are ready, and I trust you are as well.

Thank you.

Senator INOUYE. Thank you. Mr. Hedlund.

STATEMENT OF JAMES HEDLUND, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC

Mr. HEDLUND. Thank you, Mr. Chairman.

Given the lateness of the hour, the fact that there are other witnesses to follow, the fact that by this time the members of this subcommittee and certainly your staff are experts in the knowledge; and finally, given the fact that the my written submission outweighs the Manhattan telephone directory, I am going to endeavor to stay well below your 5-minute time limit.

At the outset I have to say that INTV is at the same time grateful and frustrated. We are, of course, very grateful to you, Senators Hollings and Danforth and the other members who have introduced S. 12.

But at the same time we are frustrated that in spite of the widespread support that you were able to generate last year for your cable legislation, in the end, it nonetheless did not become law.

Now lest there be any question about it, the principal interest of America's 300 plus independent television stations in this legislation, are in those provisions guaranteeing us access to the home, and by that I mean access to the 60 million plus cable television subscribers that the FCC has also licensed all broadcasters to serve, access to those very same viewers for whom the Communications Act, very properly in our mind, requires us to program and behave in a manner befitting of the public interest.

Now these access provisions—which are more commonly known perhaps as must-carry and channel positioning—enjoy, we think, near universal approval by the members of both houses of Congress, as they have since those rules were struck down in 1985.

But I would like the committee to understand that we are not seeking, through these access provisions, a government- mandated competitive advantage over the cable industry. God knows that if there is a competitive advantage the cable operators have that over us today.

But instead we simply seek fair and reasonable access to those viewers who otherwise might be denied the ability to see their local stations, simply by the flick of a cable operator switch.

But at the same time, access to all the viewers that we are licensed to serve is no guarantee of commercial success, and we do not think the government ought to have any role in guaranteeing the commercial success of broadcasters.

But with these access guarantees, if we program properly, the people are going to watch the stations, and they will be commercial successes. But if we do not, the station is going to fail.

But at least a station is going to fail because people freely choose not to watch it, not because they could not watch it.

I am also aware that there is some understandable confusion on the hill about what the broadcasters really want. People say, do they want must-carry and channel positioning legislation or do they want retransmission consent?

I want to make very clear that we, by no means, reject at all the concept of developing a reasonable and fair revenue sharing scheme of some sort with the cable industry. And I think that is very important. But we believe must-carry must come first.

Under some of the retransmission consent proposals that I have seen, what benefits there may be—and I question whether there would be benefits at all—would flow principally to the oldest and strongest stations in the market, and those are largely VHF, network affiliated stations, while the burdens and the risks would fall disproportionately on the newer and smaller entrants in the market. And those are likely to be UHF independent stations and public broadcasters.

But it may be possible to fashion a plan that would be fair to all stations. It is our belief that the injection of retransmission consent in S. 218 would serve mainly to make the bill more controversial, with the end result being that the opportunity to pass cable legislation in the 102d Congress will be lost.

Now while my emphasis today has been on guaranteeing local broadcasters access to the consumer through carriage and channel positioning provisions, these are not our sole interests and my written testimony enumerates a number of the other concerns that independent broadcasters have, and our support for S. 12.

Given the years I have been in this business, it is really clear that through unintentional miscalculation, the Congress and the FCC has allowed the cable industry to develop into an unregulated, vertically integrated monopoly.

And that monopoly is using its market power to undermine its competition and to gobble up more and more control of the video marketplace, to the ultimate detriment of the American consumer.

Mr. Chairman, it is for that reason that INTV is delighted to support S. 12 and we will do all within our power to make sure that it becomes law before the year is out.

Thank you very much.

[The statement follows:]

Testimony of

James B. Hedlund

President,
Association of Independent Television Stations, Inc.

I. INTRODUCTION

Thank you Mr. Chairman. My name is James Hedlund and I am President of the Association of Independent Television Stations, Inc., commonly known as INTV. America's 339 Independent television stations constitute the only commercial source of non-network television information and entertainment that is available free of charge to all the American public. We can be found in 137 out of 209 television markets across the United States. Today, Independent television reaches 92.3% of this nation's households. It is our hope to continue this service into the next century.

INTV welcomes this opportunity to express its opinion on S. 12. We were strong supporters of last year's legislative efforts. We continue to support this Committee's efforts and thank you for your leadership. Last year we submitted extensive documentation into the record. In this regard, I would like to incorporate our statements from previous hearings and before the FCC, into the record.1/

1/ S. 1880: Hearings before the Subcomm. on Communications before the Senate Comm on Commerce, Science and Transportation, 101st Cong., 2d Sess. (March 29, 1990) (statement of James B. Hedlund) Comments of the Association of Independent Television Stations, Inc. in MM Docket 89-600 submitted March 1, 1990; Oversight of Cable TV: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce Science and Transportation, 101st Cong., 1st Sess. at 380 (November 17,1989) (statement of Preston Padden, President, INTV); Must Carry: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. (October 25, 1989) (statement of Preston Padden, President INTV); Cable TV: Hearings before the Subcomm. on Communications before the

While there has been some confusion regarding the television industry's continued support for signal carriage legislation, INTV remains committed to pursing must-carry and channel positioning. Over the long term the broadcast and cable industry must address the issues surrounding payment for the retransmission of local broadcast signals. The current imbalance resulting from the compulsory license cannot continue. INTV believes, however, that must-carry and channel positioning must be the first step in restoring the competitive balance between cable and broadcasting. Reliance on a system of individually negotiated retransmission rights cannot work as long as there is only one cable operator in each community. Cable is a monopsonist access provider. It is the only effective means of reaching cable subscribers. If left to individual negotiations, cable operators will exert this power and conduct a "reverse auction" driving down the a broadcasters retransmission fees. Stations will not receive fair value in this economic environment.

Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. (June 21, 1989) (statement of Preston Padden, President INTV); *Cable TV: Hearings before the Subcomm. on Antitrust Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (April 12, 1989)(statement of Preston R. Padden, INTV); *Cable TV: Hearings before the Senate Subcomm. on Antitrust, Monopolies, and Business Rights of the Comm. on the Judiciary*, 100th Cong., 2d Sess. (March 17, 1988) (statement of Milton Maltz, Chairman & CEO, Malrite Communications Group): Association of Independent Television Stations Inc., "*Free Television Under Siege: Typical and Illustrative Case Histories of Anti-Competitive Conduct by Cable Television Systems*", May 1988.

It is entirely possible that some stations will either not be carried or have to pay for carriage. In both instances these stations will not be able to participate in the "dual revenue stream." You will be creating two classes of local broadcasters. Those not carried or having to pay for carriage will find themselves at a distinct competitive disadvantage to both cable and other broadcasters. Eventually these stations will wither and die.

INTV believes it is important to keep legislative attention focused. Recently, a new proposal entitled "I pay/you pay" has surfaced. This proposal would allow television station operators to negotiate individually with cable operators for retransmission consent fees. Broadcasters not carried would be able to use "leased access" channels. According to the proposal, the FCC would be empowered to regulate the price, terms and conditions of these leased access channels.

INTV does not support the "I pay/you pay proposal." First, it provides absolutely no protection regarding channel repositioning. Channel positioning is a bedrock issue for Independent stations. Second, it is a thinly disguised attempt to get some Independent stations to pay for the carriage of larger network affiliates. Under this proposal, many of my members may be forced to pay for carriage. The cable operator would take the money and use it to help defray the costs of the retransmissions' fees. We might as well give the money directly to our competition and cut out the middleman. Finally, there is no guarantee that there will be a sufficient number of leased access channels to accommodate all local broadcast stations. For example, for a 36 channel system, a cable operator need only devote 10% of its capacity for leased access. Given competing demands from public stations as well as other program services, there is no guarantee that channel space will be available. We do not believe the Senate should divert its attention from the real issue -- must-carry and channel positioning.

It is beyond doubt that must-carry and channel positioning rules should be adopted. This conclusion was reached during the last session of Congress by this Subcommittee as well as the U.S. House of Representatives. The Federal Communications Commission also recommended that Congress adopt must-carry and channel positioning rules as long as the compulsory license remains in effect. Nothing has transpired during the year that would lead to a different policy conclusion. Therefore, INTV remains committed to must-carry and channel positioning as a first step in providing balance to the cable and off-air television marketplace. Failure to proceed at this time could spell disaster for free off-air television.

Based on last year's experience, we recognize that some of the issues raised in this legislation do not directly implicate the broadcast cable relationship. Despite valiant effort by members of this Subcommittee, legislation was derailed by an issue not pertaining directly to the must-carry issues. INTV certainly recognizes the importance of dealing with cable in a comprehensive manner. Nevertheless, if it appears that the same political calculus arises again, INTV respectfully requests that the Senate consider moving forward on stand alone must-carry and channel positioning legislation. Given the fragile economic state of the broadcast industry, it is imperative that the Senate move forward with signal carriage regulation.

II. WITHOUT MODEST RE-REGULATION OF THE CABLE INDUSTRY, FREE OFF-AIR TELEVISION WILL BE PLACED AT RISK, JEOPARDIZING THIS NATION'S INFORMATION LIFELINE.

Why should the Congress care about the competitive relationship between cable operators and free off-air television? At stake is our long held national value of promoting a diverse and free information flow to all Americans. Studies confirm that local off-air television is the number one source of news and information to the American public.[2] Free off-air television is the information lifeline of our democracy.

We may lose this lifeline in the next decade unless the unbridled power of cable is restrained today.[3] What will

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[2] By a better than six to one margin, Americans say broadcast television has better local news (probably because few cable channels carry local news programs). And by a 12 point margin, the public says that regular television provides better national news coverage. See 1989 TIO/ROPER REPORT, at 5.

[3] A recent study concluded:

> As the decade draws to an end, broadcast television has seen its competitive universe turned upside down. Once apparently invulnerable, with steadily growing advertising revenue and growing audiences, broadcast television now sees simultaneously its advertising revenues and its audiences shrinking. Broadcast

happen to the countless millions of Americans who cannot be connected to the wire or are unable to afford the unregulated subscriber fee?4/ Where will they access information about their local communities? These people will be disenfranchised from the information flow. They will become "information have nots" in a society that is rushing head long into the 21st century with its promise of advanced telecommunications.

The Office of Technology Assessment concluded recently:

> ...[C]hanges in the U.S. communications infrastructure are likely to broaden the gap between those who can access communications services and use information strategically and those who cannot. Moreover, the people most likely to be adversely affected will be those for whom the new communication technologies are held out as a means to improve their circumstances -- the poor, the educationally disadvantaged, the

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> television faces a competitive force - cable television - that is enjoying steadily rising revenues, is spending more for programming and is attracting away broadcast viewers. The current calculus is at its historically most precarious for broadcasting. As broadcasting's revenue growth has slowed, so has its spending for programming. Hence, broadcasting's rivals for programming - basic cable and pay cable programming - both flush with rising advertising revenues and higher user fees, are bidding programming and thereby audiences away from broadcasting. Any further negative shocks to the broadcast advertising revenue stream would accelerate this process.

Lilley, William III and Rudolph Penner, *Impact of Advertising on the Competitive Structure of the Media: With a Special Analysis of Advertising of Automobiles, Beer, Wine Tobacco and Liquor*, (Leadership Council on Advertising Issues, 1990) at 14. (hereinafter "Lilley & Penner")

4/ The cable audience is relatively wealthier than the broadcast audience. Of course the broadcast audience pays nothing for its programming. The income disparity between cable and cable households appears to be widening. In 1984, the disparity was 12.5%. In 1988, the disparity increased to 14.3%. *Id*. at 27.

> geographically and technically isolated, and the struggling small business.5/

Make no mistake about it, the cable industry does not intend to serve all Americans with universal television service. Last December cable industry leaders sarcastically stated that they would probably ignore the needs of 25% of the population. According to cable, these citizens are not high profile consumers that drive advertising revenue or subscriptions and therefore do not deserve to be served. On the other hand, off-air broadcasting will provide this universal service. The economics of broadcasting -- indirect payment through advertising -- will insure that all citizens have access to information. Our responsibility as public trustees will insure that all citizens have access to programming that responds to the needs of the community.

Absent free off-air television, government policy makers will be confronted with the costs of providing some form of lifeline service for those not connected to the wire, a cost which must be borne by the taxpayer or subscribers. Free off-air broadcasting provides this lifeline service without the need for government subsidies. On the contrary, the advertising on free television helps drive the economy.6/

5/ U.S. Congress, Office of Technology Assessment, Critical Connections: Communications for the Future, OTA-CIT-407 (Washington, DC: U.S. Government Printing Office, January 1990) at 11.

6/ See e.g., Steiner, Robert. " Judging the Welfare Performance of Manufacturers' Advertising", Jour. of Advertising, Vol. 10 (1981) at 3-13.; Parris, Paul & Mark Albion, "The Impact

For those fortunate enough to subscribe to cable, control over information will be in the hands of one entity -- the cable operator. The problem is exacerbated by the tremendous horizontal concentration that exists in today's cable industry. A half century of effort to promote diverse local ownership of the mass media will be in vain. Unless rules are established today, the political destiny of local communities across America will be placed in the hands of one monopoly gatekeeper.7/

I am not here to denigrate cable. Cable has provided the American public with new viewing options. Nevertheless, we cannot ignore the centralization of power that now defines the cable industry. Government policy should be directed towards rectifying the competitive imbalance in today's marketplace. The American public cannot wait for the promised development of new

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of Advertising on the Price of Consumer Products," *Jour. of Marketing*, Vol. 44 (1980) at 17-35.

7/ The inter-relationship between must-carry, channel position and the political broadcasting requirements of Sec. 315 and 312 A(7) should not be overlooked. Without must-carry or channel positioning regulations there is no guarantee that political messages on broadcasting will ever be seen by half the television audience. The efficacy of both these statutory requirements can be undermined in the present unregulated environment. Moreover, there is a fundamental difference between having the option to acquire political time from several broadcast channels in a local market as opposed to a single monopoly video provider. Finally, imposition of political broadcast rules on cable are more difficult from a constitutional standpoint than imposing similar restrictions on broadcasting. *See* Cable Television: *Hearings before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2nd Session (May 11, 1988) at 297 (Statement of Commissioner James H. Quello). Attached as Appendix A.

technologies such as MMDS, DBS or broadband fiber optics.8/ Cable's ability to deny these competitive services access to programming insures that competition from these sources will never be realized. America's only viewing alternative to cable is off-air broadcasting. This free viewing option is in danger because the lack of regulatory oversight has led to excessive concentration in the cable industry. If action is not taken, we may lose the only alternative to cable before the arrival of competitive alternatives.

III. THE CABLE INDUSTRY HAS BECOME HIGHLY CONCENTRATED, CREATING ANTI-COMPETITIVE INCENTIVES

Should this development concern the Congress? Yes! Its traditional concerns with media concentration -- promoting diversity of voices and economic competition -- are dramatically present in the cable industry.9/

8/ While we applaud efforts to increase competition, such a policy is no substitute for carefully crafted re-regulation at this time. Today, MMDS reaches only 0.4% of cable subscribers. *Notice of Proposed Rulemaking & Notice of Inquiry* in Gen Docket No. 80-113, 90-54, FCC 90-60, (released February 22, 1990) at 1 n.9. While there has been renewed interest in DBS, we may not see an operational system until 1995. *Cableworld*, January 20, 1990, at 4. Finally, the most optimistic estimate for the installation of broadband fiber by telephone companies places fiber in only 18% of U.S. households by the year 2000. Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies and Institutional Change*, November 1988, at 101.

9/ The market power of the cable television industry was amply demonstrated by an analysis of the industry's "Q" ratio. *See* Appendix B.

Separate and antagonistic ownership of the mass media has long been a goal of federal policy makers. The policy has its foundation in the First Amendment goal of promoting a diversity of ideas and speech throughout the country.10/ Federal policy has always been vigilant to restrain concentration when it threatened a diversity of voices even though it did not rise to the level of an anti-trust violation.11/

A. Horizontal Concentration

The trend towards increasing horizontal concentration in the cable industry is unparalleled in American industry. The top two MSOs serve 34% of all basic cable subscribers.12/ Moreover, TCI, the largest MSO, has interests in cable systems that reach approximately 11.9 million subscribers, amounting to 22% of all cable subscribers.13/

The Congress should be concerned with horizontal concentration in the cable industry. Each cable operator is a local monopoly gatekeeper. As a gatekeeper, the local cable

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10/ *See* *Associated Press v. United States*, 326 U.S. 1, 20 (1945)

11/ *See* *FCC v. National Citizens Committee for Broadcasting*, 426 U.S. 775 (1948); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 193 (1956).

12/ *Wall Street Journal*, March 19, 1990 at B1.

13/ *Id*.

operator has ultimate control over what information goes through the gate and down the pipeline.14/

Excessive horizontal integration has its economic consequences as well. By controlling an ever increasing subscriber base, large MSOs are able to multiply the monopoly power of each local system and exert leverage over the program industry. Manifestations of this power can be seen in the ability of large MSOs to extract monopoly rents from the program community. Large MSOs are able to secure large bulk discounts from cable programmers. Yet surprisingly, the prices charged to subscribers are generally the same for both large and small cable operators. In other words, the savings from these large bulk discounts are not passed on to consumers. They are retained as monopoly rents by the cable operator.15/

The most extreme example of this raw power is the ability of large multiple system operators to extract ownership interests from cable programmers. A situation that has led to rapid and excessive vertical integration in the industry.

14/ Broadcasters have no such control. Regardless of their size, they are only one voice in a local market. They have no control over other channels of information. Unlike the cable operator, broadcasters cannot turn off the information spigot.

15/ *See* Shooshan & Jackson, *Economic Analysis of Concentrated ownership of cable Systems*., July 18, 1986, at 1.

B. Vertical Integration

Vertical integration has become the cable industry's hallmark. Our complaint is not against vertical integration *per se*, but, with the fact that there is a monopoly gatekeeper at the end of cable's vertical chain.16/

Controlling essential facilities in local markets has given large MSOs the ability to extract equity interests from the programming services carried on each system. A brief review of the relationship between largest MSOs and the most popular cable networks proves the point.17/

16/ Cable can be distinguished from broadcasting in this regard. Cable's local monopoly pipeline multiplies the power of vertical integration. Cable can make channel position and carriage decisions without regard to subscriber preference. Cable subscribers have no alternative. Moreover, cable can pass all of its programming costs on to its subscribers with little fear of customer loss. The GAO's analysis that basic cable rates increased 29% with no subscriber loss attests to the relatively inelastic demand enjoyed by the cable industry. Subscriptions continue to increase even though rates increased 13.1 percent in 1990, more than twice the rate of the CPI. *Multichannel News*, January 21, 1991 at 24. Indeed subscriptions increased even though cable subscribers believe that the rate increases exceed the perceived value of the service. *Broadcasting*, January 14, 1991 at 108.

Of course there is vertical integration in broadcasting. However, vertical integration in broadcasting does not end in a local monopoly franchise. Vertically integrated broadcasters must compete with each other in local markets throughout the country. Even in this situation, however, the government has established rules governing vertical integration. *See* Financial Interest and Syndication Rules, 47 C.F.R. Sec. 73.658(j) (1983).

17/ *Channels: 1991 Field Guide*, January 1991 at 48-49.

TCI	TIME/WARNER	VIACOM	CABLEVISION
BET(50%)	BET	MTV/VH1	Bravo
AMC(43%)	HBO/Cinemax	Nickelodeon	AMC(50%)
Discovery Channel (14%)	Comedy Channel	The Movie Channel	CNBC(50%)
Home Sports Network(60%)	TBS (CNN, TNT Headline News) WTBS	Lifetime (33%)	Sports Ch. (50%)
		Pacific Sports Network (50%)	Sports Ch. Amer.(50%)
		Prime Northwest Sports Net. (50%)	
TBS (CNN, TNT Headline News) WTBS		Showtime	

The level of vertical integration is evidence of the leverage that large MSOs can exert over their program suppliers.18/

Apart from creating distortions in the program market, vertical integration when combined with a local monopoly bottleneck creates dangerous anti-competitive incentives.19/

18/ TCI has transferred some of its programming services to Liberty. This so called "spin-off" should be named "All in the Family." The owners, boards of directors and corporate offices are essentially the same. Moreover, there is no guarantee that TCI will not have simply merged the companies at a future date. Compare this so-called "spin-off" to CBS when it was required to divest itself of Viacom. In that case the Commission prohibited common ownership of stock and prohibited CBS employees from sitting on Viacom's board of directors. See Columbia Pictures Industries Inc., 21 RR 2n 1313 (1971). The so called "spin-off" should be given no weight as a regulatory matter.

19/ There may be a disincentive to engage in new program production, if large MSO's can extract equity thereby reducing future profits. See Shooshan & Jackson, Economic Analysis of Concentrated Ownership of Cable Systems, July 18, 1986.

First, there is a strong incentive for cable operators to favor their own programming services over what is perceived to be competitive independent services. NBC's experience with TCI and its failed attempt to launch a competitive news service to CNN illustrates the point. In addition, Viacom was forced to litigate against Time Inc, in order to gain access for Showtime in New York. TCI's decision to replace the Learning Channel with the Mind Extension University has significantly impaired the economic health of that program service. Most recently, the USA network finally settled a 30 month legal dispute with Jones Intercable regarding carriage of the network.20/

Broadcasters are in a more precarious position because they compete directly with local cable operators for advertising revenue. This provides an added incentive to deny carriage or reposition a broadcast signal.21/ If a broadcaster loses some of

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Moreover, as will be discussed infra, placing broadcasters at a competitive disadvantage will ultimately damage the program market. The competition resulting from broadcast participation keeps the programming market healthy. However, the trend is for broadcasting to account for less of Hollywood's entertainment budget (from 18.5% in 1988 to 17.5% in 1993) while cable's expenditures continue to grow (from 27.9% in 1988 to 29% in 1993). See Veronis, Suhler & Associates; Communication Industry Forecasts, 1989-1993 at pg 83. Cable's increasing strength will eventually allow it to dominate the programming market.

20/ Broadcasting, March 11, 1991 at 53.

21/ Ownership of programming and advertising also provides a disincentive for cable operators to develop extensive channel capacity. At some point the cable operator must balance the revenue earned from the additional narrow interest channel against the advertising loss due to increased fragmentation of the audience. Many cable operators have found that 36 channels provide the optimum capacity. See Paul Kagan Associates Inc., Marketing New Media. January 18, 1990.

its audience then it enhances the value of the cable system's advertising spots. The loss of viewership benefits the cable operator who is competing with the broadcaster for local advertising revenue. In addition, by dropping local broadcast signals, a cable operator can use the channel to increase its own advertising inventory. Thus, there is a double incentive for cable operators to take anti-competitive steps against broadcasters.22/

For the last several years the cable industry has relied on a study by Dr. Benjamin Klein to demonstrate that cable systems do not favor their own vertically integrated program channels. While the analysis is flawed generally, it is important to note that Klein's analysis specifically ignored broadcasters. The study contains no comparison between channels in which cable has a financial interest, through advertising or program ownership,

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22/ It is in this context that INTV opposes the creation of local cable channels such as WGRC in Rochester NY. These local "channels" enjoy the advantage of large vertically integrated parent company, in this instance Time/Warner, as well as the benefit of a local monopoly. Unlike other competitors Time/Warner can cross promote WGRC on multiple channels; draw revenues from subscribers to purchase programming; sell advertising in combination with other channels; control the channel position or carriage of competitors and utilize the vast resources of Time/Warner for acquiring program product. The pattern of abuse has already begun. For example; WGRC has already presented preview weekends of HBO and Cinemax, complete with spot adjacencies. WGRC has already "cherry picked" programming from traditional pay services. For example Buffalo Sabres hockey games, normally found on regional pay sports channels, have been carried on WGRC. The ability to "cherry pick" programming from traditional pay service, gives WGRC -- a basic cable service -- a jump in the normal film distribution pattern. The strategy most certainly will increase viewership on the channel thereby attracting more advertising. No other competitor has the ability to engage in such activity or draw upon the programming strength of a corporate giant.

and broadcasters. As noted previously, cable has an extra incentive to discriminate against broadcasters.23/ The Subcommittee should expand the concept of vertical integration to include all channels in which a cable operator possesses a financial interest. The focus of public policy should be to eliminate the incentives to discriminate against competing programming services. In this regard, the Subcommittee should be concerned with all financial interests and relationships between a cable operator and its programming channels, not simply actual ownership. In its 1990 Cable report, the FCC correctly identified the problem.

> Cable and broadcast programming compete for advertising revenues. Cable operators' incentive to deny carriage or to provide disadvantageous carriage (e.g. frequent or ill timed channel repositioning) to program services in which they have no financial interest appears to be particularly great as against local broadcasters. This creates a market disadvantage in local commercial broadcasters' ability to compete against cable operators for advertising revenues.24/

In sum, cable has become a vertically and horizontally integrated monopolist. No less an authority than R. E. (Ted) Turner has averred in a federal court complaint that cable operators exercise monopoly power over essential facilities.25/ Wall Street analysts said it best when it described why TCI was an

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23/ An extensive critique of Dr. Klein's analysis is attached here to as Appendix C.

24/ 1990 Cable Report in MM Docket No. 89-600, FCC 90-272 (released July 31, 1990) at page 12.

25/ Cable News Network, Inc. v. Satellite News Channels, Civil Action File No. C83-430 A, U.S. District Court N.D. GA, (Complaint filed March 3, 1983).

attractive stock because it "dominates a monopoly business and is still growing."26/

IV. CABLE HAS AND WILL CONTINUE TO EMPLOY ANTI-COMPETITIVE PRACTICES AGAINST LOCAL BROADCASTERS

The cable industry will act on its anti-competitive incentives. Even during a period of heightened scrutiny by Washington, the cable industry has shown a propensity to flex its anti-competitive muscle. A study of the cable industry's behavior was performed by the FCC in 1988. This study was commenced at the behest of Chairmen Hollings, Inouye, Dingell and Markey. To date, this study remains the only true independent analysis of carriage and positioning problems. Its results are most revealing.27/

Generally, the study underestimates the problem. The carriage data submitted by cable systems was on a purely "voluntary" basis. Only 50.6% of the cable systems surveyed returned their questionnaires at all. The over 4,000 cable systems that refused to respond are more likely to be the systems that had more to hide than those that voluntarily disclosed local signal carriage information.28/

26/ County NAT WEST USA, November 8, 1989, at 1.

27/ A copy of the Commission's Report is attached as Appendix D.

28/ It is also significant that the Commission "had to rely on the [cable operator] survey participants for the accuracy for the data provided." FCC Report at Paragraph 3. This means that every mis-statement or under-statement of the number of local

A. *There Is Substantial Objective Evidence That Vertically Integrated Monopoly Cable Operators Have Denied Carriage To Local Broadcast Stations*.

Even the incomplete and probably skewed data submitted by cable systems to the Commission demonstrates graphically that denial of carriage of local television stations by cable systems is extremely widespread. The Report reveals, among other things, that:

1. Of the 4,303 cable systems that voluntarily disclosed data to the FCC, *869* systems admitted denying carriage to *704* television stations in *1,820* instances.[29] Moreover, 279 of the stations dropped, involving 753 instances of non-carriage, were eligible for must-carry status even under the limited "compromise" post-*Quincy* must-carry rules agreed upon by both the cable and broadcast industries.[30]
2. *241* of the reporting cable systems have denied carriage to *three or more* local stations, and *113* systems have denied carriage to *four or more* stations.[31]
3. The vast majority of local Independent stations dropped by responding cable systems -- at least 378 of 485 (78%) -- were located within 50 miles of the cable headend.[32]
4. By far the most frequent replacement for a dropped local television station is a basic cable network -- the program services in which cable operators often own

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stations denied carriage by a cable system went completely undetected by the Commission.

[29] *FCC Report*, Table 2.

[30] *Id*., Table 2A. These figures are extrapolated and therefore approximate.

[31] *Id*., Table 4.

[32] *Id*., Table 7.

equity interests and/or profit from local advertising sales.[33]

5. In 236 instances, reporting television stations made cash payments or supplied other consideration (usually equipment) in return for continued carriage on cable. At least 120 of these payments exceeded $45,000 per year.[34]

It bears repeating that these are numbers supplied voluntarily by the one-half of the cable systems surveyed by the Commission that returned their questionnaires. Even among these systems that came forward, more than 20 percent (869 of 4,303 systems) have dropped one or more local stations from their channel lineups in 1,820 instances.

If one makes the extremely conservative and optimistic assumption that the incidence of non-carriage of local stations on the part of cable systems that did not disclose information to the FCC is roughly the same (and that none of the reporting cable systems understated their non-carriage of local stations), it would mean that approximately 1,700 cable systems have denied carriage of local free television stations in approximately 3,600 instances. Thus, any way that one looks at these numbers, the FCC Report reveals clearly that non-carriage of local stations by cable systems is a serious problem numbering in the thousands in terms of both cable systems and incidence of non-carriage.35/

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[33] *Id.*, Table 8.

[34] *Id.*, Table 14. 120 instances of cash payments and an additional 30 instances of a "combination" of considerations were reported. *Id.*

To supplement the aggregate numbers in the FCC and NCTA surveys, INTV in 1988 prepared a compendium entitled "Free Television Under Siege."36/ The report contained a synopsis of cable mis-deeds in local markets all across the country. Letters from local broadcast stations describing their difficulties in greater detail were also included. Finally the report included an appendix which contained various evidentiary materials (including letters from viewers and cable operators) relating to these case histories.

The pattern of anti-competitive abuse continues to this day. Last year, INTV submitted additional examples of cable's miscreant behavior in the FCC's cable proceeding MM Docket 89-600. We found an additional four new stations that were on the air but never given carriage.37/ We also uncovered 17 stations

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35/ The National Cable Television Association also conducted its own study of cable broadcast signal carriage practices. NCTA's report is too self-serving and biased to be accorded any significant evidentiary weight. However, even the NCTA report revealed that 205 cable systems that chose to respond were not carrying, and 2.5 million cable subscribers were not seeing, all the local stations "qualified" for carriage under the watered down "post-*Quincy*" compromise must-carry rules. *NCTA Report* at 7, Table 1. In short, even the cable industry's own self-serving data demonstrates the existence of a problem.

36/ A copy of this report was submitted to this Subcommittee on a pervious occasion. A summary of the results is included and attached as Appendix E.

37/ KTVD-TV Ch. 20 Denver, CO; WAKY-TV Ch. 56 Melbourne, FL; WGOT-TV Ch. 60 Merrimack, NH; WYHS-TV Ch. 69 Hollywood, FL. Some stations were never carried by several cable operators. *See* Appendix F.

that were dropped from cable systems.38/ In some cases, a station was dropped or denied carriage on several cable systems.

Denials of cable carriage have had a tremendous negative impact on local broadcast stations. Last year twenty-three commercial Independents were in various stages of bankruptcy proceedings. Last year a survey conducted by the INTV Journal found that 12 Independent stations went off the air in 1989. While cable carriage practices were not the sole cause of these bankruptcies, they certainly were a major factor.

B. Cable Operators Have Engaged In Anti-Competitive Repositioning Of The Cannels Of Local Stations.

System operators have not been reluctant to employ an anti-competitive tactic almost as damaging as non-carriage -- channel shifting. Channel shifting creates two problems for broadcasters. First, audience confusion reduces viewership. After building an audience on a particular cable channel, broadcasters are shifted and audiences can't find them.

38/ KDVR-TV Ch. 31 Denver, CO; KLJB-TV Ch. 18 Davenport, IA; KSCI-TV Ch. 18 San Bernardino, CA; WACX-TV Ch. 55 Leesberg, FL; WCAJ-TV Ch. 68 Birmingham, AL; WHMB-TV Ch. 40 Indianapolis, IN; WNEG-TV Ch. 32 Toccoa, GA; WOAC-TV Ch. 67 Canton, OH; WTGI-TV Ch. 61 Philadelphia, PA; WCOR-TV Ch. 20 Montgomery, AL; KLJB-TV Ch. 18 Davenport, IA; KTXL-TV Ch. 40 Sacramento, CA; WFHL-TV Ch. 23 Decatur, IL; WFXT-TV Ch. 25 Boston, MA; WAMI-TV Ch. 15 Mobile AL; WWAT-TV Ch. 53 Chillicothe, OH; WYED-TV Ch. 17, Goldsboro, NC. All of the above stations were dropped from cable systems located within a television stations grade B contour. Nine stations were dropped by cable systems within 35 miles of the station. See Appendix G.

Second, cable operators have built distribution plants in which all of the channels are not equal. The first twelve channels (2-13) get through to all cable-connected sets. However, the higher channel numbers (14 and above) are not viewable on many cable-connected sets. Local stations shifted to a channel position higher than 13 cannot be received at all on many television receivers. Non-"cable ready" sets that are connected to a cable without a converter box receive via cable only those stations and program services carried on channels 2-13.[39] Being shifted "up" is the equivalent of being removed from the system with respect to these television sets. The signal goes down the wire but does not exit. Thus, cable system operators are able to inflict competitive injury on local Independent stations by moving them from desirable low number channel positions to "cable Siberia."

In the FCC's survey, 974 of the cable systems responding admitted that they had channel shifted one or more local stations in almost 3,000 instances.[40] Only 15% of these shifting instances were attributable to "technical" reasons.[41] In almost every instance, the stations shifted have been replaced by cable program services in which the system operator is selling advertising and/or in which the operator has an equity interest.

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[39] Estimates of the universe of non-"cable ready" sets are difficult to calculate. Nevertheless, based on data from the 1989 Television Fact Book, approximately 42% of existing television sets in homes today are not "cable ready".

[40] FCC Report at Table 10.

[41] Id., at Table 13.

INTV conducted its own unscientific study of 70 instances of channel shifting on TCI cable systems as reported to our Association. In 65 of those 70 instances, the original channel position of the local station was subsequently filled with a program service in which TCI had an equity interest.

INTV's report "Free Television Under Siege" is replete with examples of anti-competitive channel shifting by cable operators. Moreover, these channel shifting problems continue to occur on an almost daily basis. On January 1, 1989, the leading Independent station in West Palm Beach, Florida was shifted, without any warning, from channel 9 to channel 29 on a major local cable system. Repeated efforts to resolve the issue with the local cable manager, and with senior corporate officials, have proven fruitless. In December, 1988 KICU-TV in San Francisco, was shifted off of channel 6 to make room for a cable barker channel promoting the system operator's proprietary pay-per-view service. In January 1989, the TCI system in Millbrae, California, moved three local Independent stations out of the VHF band and replaced them with three cable program services (CNN, American Movie Classics and The Discovery Channel) in which TCI holds substantial equity interest and in which TCI sells advertising availabilities. The stations received no notice of the shifts, which occurred just three days prior to the start of the critical February Nielsen and Arbitron rating period. One of the stations commissioned an independent, professional survey that showed that

20% of Millbrea cable households with "second" TV sets, who could formerly receive the station on those second sets, are no longer able to do so because of the channel shifts.

Another example involves the Kansas City market. ATC is the biggest and most important cable system in Kansas City, Missouri. In October of 1988, it embarked on a policy of channel shifting that confused the public and prevented signals from reaching many viewers. For whatever reasons, ATC repositioned *all* local broadcast stations in Kansas City. The three VHF network affiliates were all moved off-channel after years of being carried on-channel. KSHB-TV, Ch. 41, which for years had been carried on channel 3, was moved to channel 33. The local Kansas City stations were moved around to make room for cable program services on which ATC sold advertising and had an ownership interest.

The systematic repositioning of local broadcast stations continues. INTV submitted additional evidence of this problem to the FCC in MM Docket 89-600. We found that an additional 26 stations that had been repositioned.[42]

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[42] KAME-TV Ch. 20 Reno, NV; KBHK-TV Ch. 44 San Francisco, CA; KCWT-TV Ch. 27 Wenatchee, WA; KDVR-TV Ch 31 Denver, CO; KTTY-TV Ch. 69 San Diego, CA; WACX-TV Ch. 55 Leesburg, FL; WDZL-TV Ch. 39 Miami, FL; WGNT-TV Ch. 27 Portsmouth, VA; WGSE-TV Ch. 43 Myrtle Beach, SC; WHNS-TV Ashville, NC; WOAC-TV Ch. 67 Canton, OH; WPGH-TV Ch. 53 Pittsburgh, PA; WPMT-TV Ch. 43 York, PA; WPTY-TV Ch. 24 Memphis, TN; WYST-TV Ch. 68 Syracuse, NY; WTPG-TV Ch. 44 St. Petersburg, FL; WTTE-TV Ch. 28 Columbus, OH; WTTO-TV Ch. 21 Birmingham, AL; WTVZ-TV Ch. 33 Norfolk, VA; WTXX-TV Ch. 20 Waterbury, CT; WUTV-TV Ch. 29 Buffalo, NY; WXMI-TV Ch. 17 Grand Rapids, MI; WDSI-TV Ch. 13 Chattanooga, TN; WOIO-TV Ch. 19 Shaker Heights, OH; WZDX-TV Ch. 54 Huntsville, AL; WFFT-TV Ch. 55 Fort Wayne, IN. *See* Appendix H.

In several communities across the country, following system "upgrades", local stations have been shifted to high UHF channels that *most* consumers cannot receive even on their *primary* sets. Typically, these systems expand from 36 to 54 channel capacity, but require consumers to disconnect their old 36 channel converter boxes and drive to the cable office to trade for new 54 channel boxes. In the meantime, local stations shifted to channel positions between 36 and 54 cannot be viewed via cable.

Channel shifts are *not* a product of consumer demand. In virtually every instance, the local stations shifted are more popular (higher ratings), than the cable program services that replace them. Shifts are made solely to enhance the competitive position of the cable operator's programming and his advertising availabilities. Any doubt regarding the motivation for the cable channel shifts can be resolved by the candid explanation of one major MSO -- Jones Intercable. In a May 27, 1987 letter to advertisers, Jones described its motivation for a recent channel shift as follows:

> "On March 1, 1987, Jones Intercable made changes that greatly enhanced the value of advertising placed with us. On that date, we realigned our channels bringing four of the five channels (The Nashville Network-4, Cable News Network-6, ESPN-12, and USA-8) on which we insert advertising to channel positions between 2 and 13.
>
> "Studies performed on viewership patterns on channels 2 through 13 show that they are viewed 30% more often than higher channel positions. This means that the advertiser's exposure to area consumers increased greatly without additional cost."

In sum, there is ample objective evidence that cable operators have engaged in anti-competitive channel shifts.

The devastation of channel shifting as an anti-competitive strategy can be seen in the audience loss that accompanies the repositioning. The following examples demonstrate the point. In each case, audiences in cable households declined after the station was repositioned. The decline cannot be attributed to programming because in each instance the audience share in non-cabled households increased.

> WGNT, Portsmouth, VA; The station was shifted from channel 7 to channel 27. Its off-air audience increased by 4% while its cable audience declined 18%.
>
> WPGH, Pittsburgh, PA; The station was shifted from a VHF to UHF position. Its off-air audience increased 7% while its cable audience declined 8%.
>
> WPTY, Memphis, TN; The Station was shifted from channel 12 to channel 24. Its off-air audience increased 29% while its cable audience declined 17% after the channel shift.
>
> WTTE, Columbus, OH; The station was repositioned from channel 9 to channel 22. Its off-air audience increased 20% while its cable audience declined 6% after the shift.
>
> KDVR, Denver, CO; The Station was shifted from channel 10 to channel 31. Its off-air audience increased 27%, but its cable audience did not increase after the shift.

The audience loss in these examples is more than enough to justify government action.41/ For example, the FCC found a loss

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41/ *See* Appendix I. For a complete analysis of the audience loss for these stations.

of 1-2 percent in audience to be a sufficient dislocation to warrant re-imposition of the Syndicated Exclusivity Rules.44/

V. EXISTING REGULATORY STRUCTURE DISTORTS THE MARKET-PLACE BY GRANTING CABLE COMPETITIVE ADVANTAGES

A. Broadcasting Provides Cable With A Massive Subsidy Via The Compulsory Copyright.

1. The subsidy is significant.

The existing compulsory copyright system gives local cable operators an incredible subsidy. Pursuant to federal law, broadcasters cannot receive any payment for the retransmissions of their signals by cable operators.45/ The subsidy has existed for years. It was designed originally to insure that an infant cable industry had access to programming. The inequity of this privilege can no longer be tolerated.

In 1989, local broadcasters spent 1.3 billion dollars acquiring programming from Hollywood.46/ Cable operators paid nothing to acquire this programming. However, they retransmitted the programming to their subscribers and charged for it.

44/ See Report and Order in Gen. Docket No.87-24, 3 FCC Rcd. 5299 (1988) at para. 41. A drop of even a single rating point may represent a loss of 1/3 to 1/2 of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters.

45/. Under the royalty fee provisions of the Copyright Act, cable systems pay nothing for the right to retransmit programming from local broadcast stations. See 17 U.S.C. Section 111 (c)(d)

46/ Veronis, Suhler & Associates Inc., supra, n. 18 at 83.

The most ironic aspect of this scenario is that free off-air broadcasting accounts for 74% of the audience share points in cable households. Moreover, Independent television alone receives a 21% prime time audience share in cable households.47/ In the last quarter of 1989 viewing on Independent television alone accounted for 15% of the viewing in cable households, exceeding the audience share of all basic cable channels.

The absurdity of the present situation can be seen in the following example. A cable network, such as TNT, receives an average 24 hour rating of .75 which translates into a viewing share of 2%.48/ Even though the cable network receives a de-minimus audience share, cable operators are willing to pay $.20 per subscriber for the programming. At the same time, the third Independent broadcast station in the market attracts a larger audience than the cable network, with a 24 hour rating of 1.20 translating to an audience share of 3.2%.49/ However, the cable operator does not have to pay the broadcaster. Indeed, despite the obvious consumer preference cable operators will seek to reposition the broadcast station in order to increase viewership on the poorly viewed cable channel. Simply stated, cable operators pay fees to carry programming that draws less of an

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47/ Advertising Age, January 8, 1990, Supplement at 11.

48/ Paul Kagan Associates, Inc. Marketing New Media, No. 8, January 1990, at 2.

49/ Id.

audience, but do not pay a dime to retransmit the more popular programming of a local broadcaster.50/

Quantification of this subsidy can be seen in a recent study by Paul Kagan.51/ Based on audience viewing shares, Kagan found that off-air broadcasting contributed $9.45 of value to the average cable bill of $16.93. According to these statistics, off-air broadcasting accounted for 55% of a cable operator's net revenue. Independent television alone contributed $2.32, thereby accounting for 13.7% of cable's net revenue.

2. Broadcaster's subsidy to cable outweighs the value of cable's antenna service.

Many in the cable industry argue that cable subsidizes broadcasting by providing a valuable antenna service that extends a broadcaster's coverage. The argument is unpersuasive for several reasons. First, cable's value as an antenna service is due in large measure to an industrial policy that systematically told subscribers that they would no longer need to retain off-

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50/ Indeed, according to James Mooney, President, NCTA, the audience share of cable networks is such that it is not economically feasible to sell these program channels on an a la carte basis. They are economically viable only if they are sold as a package. Must Carry: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation United States Senate, 101st Cong., 1st Sess., October 25, 1989 at 118.

51/ Paul Kagan Associates, Inc., Marketing New Media, No. 8, January 15, 1990, at 2..

air access.52/ Cable made itself indispensable. Second, cable has systematically denied other antenna services access to programming, thereby stifling any other competitive off-air antenna service such as SMATV or MMDS. Third, the value of the antenna, in terms of advertising reach, can be questioned. With the exception of areas with significant terrain problems, off-air broadcast signals provide quality signals to the most populated portions of their market, (i.e., the television metro area). Cable may serve to extend the reach of broadcast signals out beyond the grade B, but if these areas are less populated, they may not increase appreciably a television station's overall audience. Of course this analysis will vary from market to market.

Finally, and perhaps most importantly, cable systems do not always provide good quality signals. For example, a recent survey of cable subscribers in New York found that 56.1 percent of Paragon's subscribers and 60.6 percent of Manhattan Cable's subscribers experienced repeated or prolonged reception problems. Moreover, 35% of Paragon's subscribers and 40% of the Manhattan Cable's subscribers rated signal quality as poor.53/ Thus, rather than enhancing signal access, cable may actually reduce access to signals in some instances.

52/ Report and Order 1 FCC Rcd. 864 (1986), vacated, Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir 1987), cert. denied, 108 S. Ct. 2014 (1988). The Commission found that cable systems systematically took down subscriber's antennas, thereby preventing off-air access.

53/ New York Times, March 21, 1990 at B1.

In sum, the purported value of the antenna service does not outweigh the massive subsidy given cable operators by the compulsory copyright. Of course, the value of the antenna service is further reduced given the repositioning of signals by cable operators.

B. Cable Enjoys the Luxury of Two Protected Income Streams: Subscriber Fees and Advertising.

In its recent Notice of Inquiry regarding cable television, the FCC recognized that the existing franchise process has insulated cable from competition by multi-channel service providers.54/ The impact of the exclusive franchise process can be seen in the number of competitive overbuilds across America.

Creating a local multichannel monopoly has enshrined cable's monopoly franchise, insulating it from the pressures of price competition. Its subscribers are held captive with no other alternatives. In this environment, cable has the ability to simply pass on costs of programming to subscribers. The GAO found that rates for the lowest priced basic service increased 29% and the monthly rates for the most popular basic cable services increased by 26%.55/ The Department of Labor recently reported that in 1990, cable rates increased 13.1 percent, more than double the Consumer Price Index.

54/ Notice of Inquiry in MM Docket No. 89-600, FCC 89-345 (released December 29, 1990).

55/ GAO: National Survey of Cable Television Rates and Services, August 1989.

Nevertheless, despite rate increases that were three times the consumer price index, cable subscribership continued to increase. Indeed, total spending on subscriptions will continue to grow at a compound annual rate of 6.6%. In 1988 revenue from subscriptions amounted to $10.3 billion dollars. This will increase to $14.2 billion by 1993.56/

The most logical explanation for this fact is that the demand for cable service is relatively inelastic, and not sensitive to price. In other words an increase in price will not result in a significant loss of subscribership.

Cable is also given the advantage because it is the sole provider of multichannel advertising. It has the unique ability to sell advertising packages on multiple channels. In contrast, a broadcaster is limited to one video advertising channel per market.57/ While broadcasters may, in certain circumstances, own a radio and a television facility, engaging in joint advertising arrangements may create antitrust problems.58/

Cable can also manipulate the channel lineups to increase audience exposure to specific channels thereby maximizing exposure to advertisers. It is no wonder that cable is looking

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56/ Veronis, Suhler & Associates, *supra*, n. 18 at 67.

57/ *See* 47 C.F.R. 73.3555 (a)(b)(1988).

58/ While the Commission has eliminated its regulations regarding combination and joint advertising practices, engaging in such activity may give rise to antitrust violations, which if adjudicated, could threaten a broadcast license. *See Elimination of Unnecessary Broadcast Regulation, Second Report & Order* in MM Docket No. 83-842, FCC 86-111 (released March 31, 1986) at para. 56

to advertising as a significant source of revenue in the future. In 1993, advertising will account for 14.7% of the industry's revenues, compared to 5% of the industry's revenues ten years earlier.59/

Between 1988 and 1993 total cable advertising will grow at a compound annual rate of 16.1%. Local advertising will grow at a compound annual rate of 17.1% from $250 million in 1988 to $550 million in 1993. National advertising will grow from $910 million in 1988 to $1.9 billion by 1993.60/

VI. COMPETING AGAINST AN UNREGULATED MONOPOLY WITH A DUAL REVENUE STREAM WILL LEAD TO THE DEMISE OF OFF-AIR BROADCASTING.

Concerns over the demise of off-air broadcasting are not simply empty rhetoric from Washington lobbyists. The scenario has already been described by economic experts.

> Expansion in the number of cable households will boost cable audiences and advertiser use of cable as a medium. As the basic cable networks realize rising advertising revenues, along with rising fees from cable systems, they will have greater economic resources to purchase higher priced programs. Higher quality programs should generate larger viewing audiences. 61/

Broadcasters are now in a cycle in which they will be continually outbid for programming. This in turn will lead to a decline in audience and a subsequent loss of revenue.

59/ Veronis, Suhler & Associates, supra, n. 18 at 67.

60/ Id. at 67.

61/ Id. at 65

> The emerging competitive calculus -- one increasingly favorable to cable -- has clear social implications. Put simply, as the cable audience grows and the broadcasting audience shrinks, the cable audience in relative terms becomes wealthier and the broadcasting audience poorer. This disparity is broadening as cable raises its user fees in order to cover its increased programming costs, resulting from bidding higher priced programming away from broadcasting.62/

The downward spiral has already begun, as top quality programming is being siphoned off free off-air broadcasting.

A. Sports Siphoning

Sports siphoning has become commonplace. For example, in New York, the Madison Square Garden Network has obtained the rights to the New York Yankees' games. Prior to this arrangement, 75 games could be seen on WPIX. After a year of negotiation it now appears that the Madison Square Garden Network has made arrangements to buy time on WPIX that will bring 55 of these games back to free television over each of the next three years.63/

Once again, this summer, you will be unable to see any Major League Baseball games on free TV on Wednesday nights due to a contract between Major League Baseball and ESPN.64/ In fact, for

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62/ Lilley & Penner, *supra*, n.3 at 14.

63/ *Broadcasting*, March 11, 1991 at 68.

64/ In 1989, ESPN signed what was at the time the largest program acquisition in cable history by winning exclusive rights to 175 MLB games each year from 1990-1993. While ESPN has the

the first time the number of Major League Baseball games on free television decreased in 1990.65/

Last year's multi-year NFL contracts for the first time include rights for both ESPN and Turner Broadcasting. ESPN's NFL package, worth $450 million, includes 13 prime time games and the Pro-Bowl. To recover the costs, ESPN announced an additional subscriber "surcharge" of $.14 per-subscriber.66/ The TBS

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greatest penetration of any cable network - 60% - that still leaves 40% of the country unable to view these games. Multi-Channel News, February 29, 1990.

65/ In 1989, there were 1,653 games on free off-air television. This decreased to 1,639 in 1990. In contrast, the total number of games on regional cable networks will increase from 1,061 in 1989 to 1,137 in 1990. Broadcasting, March 5, 1990 pg 36.

Obviously, the decline in games off free television is not dramatic. It does demonstrate, however, that local free off-air television perhaps has reached its zenith with regard to covering major league baseball. There is every reason to believe this decline will continue. As one analyst noted:

> As a result of this changing business calculus, one clearly demarcated block of programming - Major League Baseball games - will start migrating in 1990 away from the national television networks and local television stations and over to local pay cable channels and a national basic cable network. It marks the first significant instance where relatively poorer non-cable households will have lost video access to programming which heretofore had been televised free by over-the-air broadcasting.

Lilley & Penner, supra n.3 at 29

66/ The surcharge is the best evidence of the subsidy that broadcasters give to cable operators. Games remaining on off-air broadcasting are retransmitted to subscribers by cable operators without cost. Because, cable is able to pass on the costs of this surcharge to its subscribers, it will not take long before cable programmers will outbid off-air broadcasting for the rights to NFL games.

package, also worth $450 million, includes 47 NFL games over the next four years.67/

NFL games are slowly, inexorably moving off free television. Indeed, NFL Commissioner Paul Taglibue recently announced his plans to move towards pay per view. Responding to a letter from Chairman Markey, House Subcommittee on Telecommunications and Finance, a NFL spokesman tried to dismiss this as merely an experiment, not altering current contracts.68/ Nevertheless the goal and the intent of the NFL is clear. NFL football will eventually move off free television. Unless action is taken today, the next round of television contract negotiations will see cable owning the rights to a significant, perhaps a majority, of NFL games.

College football has also been a significant source of sports siphoning. For example, the Big 10 Game of the Week, which had been syndicated to local stations throughout the Midwest and beyond, is now the property of ESPN. Although some Big 10 games remain on network television, the ten weekly Big 10 games cannot be viewed by cableless fans in Iowa, Michigan, and the rest of the Big 10 territory.69/ The same has happened to

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67/ Multichannel News, March 12, 1990, pg. 3.

68/ Broadcasting, March 11, 1991 at 53.

69/ For example, in 1988, nine University of Iowa Hawkeyes football games were available on free off-air television throughout the state, on either local or network television. In 1989 only 3 Hawkeye games appeared on free broadcast television. ESPN presented only 1 of the missing 6 games.

Ivy League games which are now on ESPN. Public television stations used to carry these New England rivalries.

The same holds true for other conferences. Turner Broadcasting pulled the plug on local syndication of Southeast Conference Football. One school, The University of Tennessee, seized upon the opportunity and has gone "pay per view." On the West Coast, Prime ticket has grabbed the rights to PAC ten football.70/ An example is, KCPQ-TV Ch.-13 in Tacoma/Seattle, Washington. Contracts between Prime Ticket, a regional sports' network, and the PAC 10 have reduced the number of University of Washington and Washington State University football games. But for these contracts, last year KCPQ would have been able to broadcast 8 games. Instead, viewers in Washington were limited to only 3 games.71/ It is ironic that the taxpayers, who pay for these universities through their tax dollars, now must pay to see football.

INTV has taken the lead in the issue of sports siphoning. Our concerns are premised on the fundamentally inequitable

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70/ While Prime Ticket's contract does not preclude PAC 10 teams from selling television rights to local stations, it will largely have that effect. Essentially, Prime Ticket secured the second "window", or time period on Saturday. ABC has the first "window." During these two windows individual PAC 10 teams cannot televise other games on local television stations. Accordingly, it will be extremely difficult for local stations to buy PAC 10 games unless they can convince the Conference to reschedule games at an absurdly early -- or late -- hour. Of course the Conference was the entity who agreed to sell the two prime windows to entities other than local broadcasters in the first place.

71/ See letter of Roger Ottenbach KCPQ-TV Ch. 13, May 7, 1990 attached hereto as Appendix J.

structure of the existing marketplace that guarantees that cable will be placed in a position to outbid broadcasting. Our views on this subject were stated before the Senate Subcommittee on Anti-Trust, Monopolies & Business Rights on November 14, 1989.72/

B. Programming

We are also witnessing programming moving directly to cable television and by passing off-air broadcasting. For example, three major motion picture packages from Buena Vista, Orion and 20th Century Fox bypassed the broadcast syndication window going directly to cable.73/ Lifetime has acquired exhibition rights to "L.A. Law" and 79 episodes of "The Tracy Ullman Show." It is "the beginning of a trend of half-hour programming going to cable."74/ Moreover, because of existing agreements regarding residuals, local stations will continue to lose access to top syndicated programming series and movie packages.75/

The exodus has just began. As time goes on, more and more top quality entertainment programming will leave off-air broadcasting. Indeed, while television's share of Hollywood's

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72/ A copy of this testimony is attached hereto as Appendix K.

73/ Broadcasting January 8, 1990, at 56

74/ Electronic Media, March 12, 1990 at 3, 55. Lifetime already has exhibition rights to such popular off-network hour programs such Moonlighting" Id.; Cableworld, December 18, 1989, at 15.

75/ Broadcasting January 8, 1990, at 56

revenues will decline in the next few years, cable's share of these revenues will increase.76/

It is important to realize that our complaint is not that Independent broadcasting is out bid for programming. Rather it is that the legal structure governing cable today makes it increasingly likely broadcasters will lose when they compete for programming. It is easy for cable operators to suggest that broadcasters simply did not bid for product or could not afford to pay the market rate for programming. However, Congress should look behind this simple marketplace answer to see if there are legal or regulatory impediments that distort the market.

We believe that the current regulatory environment -- or specifically the lack of regulation in some areas but not in others -- distorts the marketplace. Ultimately, this distortion will result in the demise of free off-air broadcasting.

VII. S. 12 PROVIDES FOR THE REASONABLE RE-REGULATION OF CABLE AND IS ESSENTIAL FOR THE SURVIVAL OF FREE OFF-AIR TELEVISION.

Last year INTV supported S. 1880. We continue to support this approach as detailed in S. 12. We offer the following observations on the draft now before the Subcommittee.

76/ By 1993 televisions share of expenditures for filmed entertainment programming will decline to 17.5%. Cable television's share will increase to 29%. Veronis, Suhler & Associates, supra, n. 18 at 83.

A. Must-Carry

We believe must-carry provisions of S. 12 are sound public policy. For several years INTV has argued that cable operators benefitting from the compulsory license should be required to carry local broadcast stations. We generally endorse the definition of "qualified stations" that appears in the staff draft.

Such, legislation will pass constitutional muster. First, there is no *required* carriage *per se*. Instead, use of the compulsory license is conditioned upon the carriage of broadcast signals. The decision whether to carry local broadcast signals rests with the cable operator. This approach has never been presented to the courts.[77] In addition, we believe the factual record developed in the past few years supports a finding that "localism", as envisioned by section 307(b) of the Communications Act, constitutes a substantial government interest sufficient to support signal carriage obligations of the type contemplated by the proposed statute.[78]

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[77] For a discussion of the constitutionality of this approach, *See* Appendix L.

[78] It is important to remember that previous decisions did not preclude enactment of properly crafted must carry rules.

> We do not suggest that must carry rules are *per se* unconstitutional and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial government interests.

Generally, there have been two approaches to must-carry rules. One approach would set aside 25 percent of a cable operator's channel capacity and enact an audience share standard. Under this approach, a station would be qualified to be carried if it received a 2 percent audience share and a net weekly circulation of five percent. This approach formed the basis of the INTV, NAB, NCTA agreement last year.

S.12 represents an alternate approach where there is no audience share test. However, the number of channels set aside for local signal carriage is increased to 33 percent. INTV can certainly support this approach. In many respects, calculation of the audience share standard can become complex and administratively difficult.

We would note, however, that the purpose of the audience share standard was to meet a concern expressed by the Court in Quincy that must-carry rules reflect "consumer preferences". To the extent this is an important consideration, INTV suggests that S. 12 contain a priority requirement. Under such an approach, carriage priority would be given to those stations with the largest viewership.

Century Communications Corp. v. FCC, 835 F.2d 292,304 (D.C. Cir. 1987) clarified 837 F.2d 517 (D.C. Cir 1988).

The tortured history of "must carry" in the past few years reveals that the FCC did not properly articulate the government's substantial, some would say compelling, interest in promoting localism. See Appendix A for a more thorough discussion of this issue.

For the past several years, the industries, Commission and Congress have attempted to define the geographic scope of must-carry requirements at 50 miles from the cable headend. INTV continues to support the 50 mile standard as a first step in the analysis. We note, however, that in many instances a station's market may extend beyond 50 miles. In these situations, we believe that must-carry and channel positioning protection should be provided by all cable systems within a station's Area of Dominant Influence (ADI).

The question is whether the Senate should adopt a geographic must-carry limit that reflects marketplace realities. The ADI market definition more accurately reflects the true economic environment of broadcasting. Programming is purchased on an ADI basis. Advertising rates are set on an ADI basis. Moreover, cably systems, through interconnects, are selling advertising for geographic areas that are roughly equivalent to the ADI. Given this reality it simply makes sense to define the local market according to the economics of the business.79/

INTV recognizes that using the ADI as a basis for must-carry raises some concerns with the compulsory license. In some areas, stations may be considered distant signals. INTV recognizes the tension between requiring a cable operator to

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79/In other contexts the Commission has incorporated ADI data into its regulations. For example, the national multiple ownership rules use ADI households to measure the audience reach of television stations for the purpose of calculating "national audience reach." 47 C.F.R. Sec. 73.3555 (d) (3) (i). Similarly, television market analysis is used in prime time access rules. 47 C.F.R. 73.658 (k) note 1.

carry a broadcast station and at the same time requiring it to pay distant signal fees under the compulsory copyright. INTV believes that carriage should still be required in these situations, provided, the broadcaster has made mutually satisfactory arrangements to insure that the cable system has access to the broadcast signal, and that appropriate compensation has been provided to cover the costs of the distant signal payment.

B. Channel Positioning

We believe local broadcasters should be given the choice to either be carried on the channel position they occupied on, July 19, 1985 or "on channel". Cable operators should not be rewarded for the anti-competitive channel repositioning that took place after the Quincy decision eliminated the rules in 1985. We therefore support the provisions in S. 12.

Moreover, broadcast stations should be carried on channels that can be received by all television sets. These requirements are not obscure technicalities. They go to the heart of a broadcaster's problems with cable television. These provisions eliminate the mechanism cable uses to behave in an anti-competitive fashion. There are several reasons for our concerns.

First, as previously noted, moving broadcast stations on to higher channel numbers makes them inaccessible on many television sets. Cable subscribers can no longer access our signals unless they are willing to pay for an additional converter box. The problem is especially acute on second set hook ups, which generally are direct wired without a converter box.

The provisions are a necessary corollary to must-carry. The ability to shift broadcast signals to channels that cannot be received on all television sets would, in effect, circumvent the must-carry requirements. You would have a policy where our signals are allowed to enter cable's monopoly pipeline with no guarantee of exiting. The public policy goal should be to assure viewer access to signals and not simply entry on a wire from which there is no exit.

Such a requirement is also consistent with the policy underlying the All-Channel Receiver Act. Consumers should not be required to pay for additional equipment simply to access UHF signals.80/

Second, a requirement giving broadcasters the choice of being positioned on the channels they occupied on July 19, 1985 is essential. This date corresponds to the court's decision in Quincy, which struck down the must-carry rules.81/ It is after this date that cable began to exercise its monopoly power by

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80/ Indeed, a clever cable operator could attempt to avoid the effects of rate regulation by placing broadcasters on channel positions that would force subscribers to pay for additional converters. Cable operators could make up for lost revenues by leasing additional equipment at higher costs.

81/ Quincy Cable TV, Inc. v. FCC, 768 F. dd 1434 (D.C. Cir. 1985).

shifting broadcast signals. In this regard, allowing cable to maintain existing cable positions would, in effect, reward cable for their anti-competitive behavior.

Simple equity justifies this provision. Cable systems originally put broadcasters on lower channel positions in order to market their product. We worked hard developing an audience on these cable channels. With a flip of the switch, we lost our audience. Of course, in most instances we were replaced by a program service on which the cable operator either had an equity interest or sold advertising.

I would point out that the so-called "on channel" policy spells disaster for local Independent broadcasting.82/ First, an "on channel" policy is simply a ploy to justify further repositioning of broadcast signals. It would lead to massive repositioning of broadcast signals.83/ Second, technical problems prevent access on all television sets. Congress' interest should be to ensure that citizens have access to

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82/ The "Myth" of the so-called "On-channel" approach is fully explained in Appendix M.

83/ It must be remembered that leaders in the cable industry have attempted to restrain the industry from engaging in massive channel shifting. As noted previously their efforts have not been completely successful. Nevertheless, once legislation is enacted, and the scrutiny of Washington fades, cable's predatory nature will be unleashed. An "on channel policy" would simply be the excuse to trigger additional anti-competitive behavior.

qualified local broadcast signals, that are carried on the cable.84/

Some have argued that broadcasters should just negotiate for channel position.85/ This is no policy. Cable is a monopoly provider of access to the home. There is no other way to reach a cable household.86/ Accordingly, there can be no free market negotiations for channel positioning. Cable simply says no. We have no alternative.

There is absolutely no incentive for cable to negotiate with broadcasters for channel position. As a business entity, it is in cable's best interest to give superior channel position to its own programming services and/or those channels on which it sells advertising. As demonstrated previously, cable does not

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84/ While the "on channel" policy has surface appeal, it has no relation to the underlying FCC allocation. The most important aspect of an FCC license is the assignment of interference-free spectrum to a local community. The key goal of localism is to provide a signal that can be received by viewers. Because an "on channel" policy would actually limit access to these signals, it runs counter to the Commission's goal of providing a fair and efficient distribution of spectrum as required by Sec. 307 (b) of the Act.

85/ If cable networks are unhappy with their channel assignment they have the option of denying the cable operator access to their programs. Because of the compulsory license, broadcaster's have no such bargaining chip.

86/ It is worth noting that the A/B switch is not a substitute for cable access. While both the Courts and the FCC appear to have embraced this purported solution, the record evidence proves that the A/B switch simply does not work. In fact, both the broadcasting and cable industries agreed that the A/B switch was not a viable solution to the problem. See Joint Petition for Reconsideration by NAB, NCTA and CATA filed in MM Docket No. 85-349 December 17, 1986; Joint Request for Stay Pending Reconsideration filled by NAB, NCTA and CATA in MM Docket No. 85-349, December 17, 1986.

assign channel positions based on market demand, (i.e., subscriber preference). Absent regulation, there is no reason to expect them to do so.

C. Limitations on Control and Utilization

INTV supports the provisions of the bill which would require the FCC to conduct a rulemaking proceeding to prescribe rules and regulations regarding limits on horizontal and vertical integration in the cable industry. Given the FCC's current inclination not to adopt rules governing concentration in the cable industry, it may be desirable to make it clear that the legislation *requires* the FCC to adopt rules. As presently drafted, the bill could be interpreted as to simply require the FCC to conduct a rulemaking.

We believe the concept of vertical integration may be drawn too narrowly. The incentive to engage in anti-competitive behavior is based on the fact that local cable operators have a financial interest in the program channels that are on their cable systems. Such a financial interest could take the form of equity ownership. However, another form of financial interest is the sale of advertising. Selling local advertising gives cable operators a direct incentive to favor those channels. As long as these "financial interests" remain unchecked, the incentive to act in an anti-competitive manner will remain.

Ideally, there should be a complete separation between ownership of the wire and control over content. This proposal was made in 1974 by the President's Cabinet Committee on Cable Television.87/ We recognize however, that imposing a strict separations requirement at this time may be unrealistic. Accordingly, we have suggested a quasi-common carrier approach. Cable operators would be allowed to own an equity interest in, or sell advertising on, one or two channels.

Such a proposal would remove these anti-competitive incentives from most of the cable channels. It would create an incentive for the cable operator to program these channels based on subscriber preference as opposed to existing incentives. We believe the Senate should adopt this approach.

D. Cross Ownership

We support the provisions of S. 12 that generally prevent the cable companies from obtaining licenses for MMDS and SMATV systems. We also agree with the provisions regarding ownership of DBS systems. Existing cable operators should not be allowed to stifle competition, thereby preserving existing market share, by simply buying out the competition.

87/ Office of Telecommunications Policy; a Cabinet Committee on Cable Communications, Cable Report to the President January 14, 1974. at 2. The Committee concluded: "We recommend adoption of a policy that would separate the ownership and control of cable distribution facilities, or the means of communications from the ownership and control of the programming or other information services carried on cable channels".

E. Rate Regulation

Our concerns in this area are triggered by a growing problem with sports and program siphoning. Costs are spread across the entire basic tier because the program service is sold as part of a package. Basic tier cable services are able to simply bid up the price of programming and recover these costs through increased subscriber fees. Because these services are part of the "basic tier," the costs are simply passed on to subscribers. Of course, subscriber demand for cable is not price sensitive, because there are no other competitive multichannel providers. The result is a continuing spiral of escalating costs. Subscriber bills increase and programming gets siphoned off free-television.

Against this backdrop is the single channel off-air broadcaster. We are limited to one advertising channel. Our advertising rates are subject to vigorous competition. We are unable to simply bid up the price of programming and pass on the costs. We lack the second income stream.

We support regulating the rates of all cable programming. that contains advertising. In this respect we support the scope of S. 12. The bill attempts to not only regulate the "basic" tier, but it also recognizes the need to focus on the rates of cable's "most popular tiers." Accordingly, the provision requiring regulation of the lowest priced tier of service that is subscribed to by at least 30 percent of a cable system's customers makes sense.

Absent this provision, cable operators would simply escape meaningful regulation by retiering their systems, creating a new "super basic" type service containing all cable program services to be sold as a package. However, by selling a smaller "basic" tier, cable operators would remain free to increase the rates of basic cable services such as ESPN, TNT etc... The problems associated with passing on the ever escalating price of programming to captive consumers would remain.

F. Effective Competition

INTV has always argued that the only effective competition to cable television is another multi-channel system.88/ We support the definition of effective competition found in S. 12. According to this proposal, a cable system is presumed to be subject to effective competition if fewer than 30% of the households in a cable community subscribed to cable. Alternatively, effective competition would also exist where the community is served by more than one multi-channel provider.89/

88/ See Comments of the Association of Independent television Stations, Inc. in MM Docket No. 90-4, April 6, 1990. A copy of a study commissioned by INTV criticizing the FCC's definition of effective competition is attached at Appendix N.

89/ Id.

I would draw the Subcommittee's attention to one point regarding effective competition. Analytically, there are two product markets. The first market involves a subscriber's ability to choose a competitive multi-channel service provider. From this prospective, cable is the retail monopoly provider of video services to customers. This market goes directly to the issue of rate regulation.

The second market involves access to television households. From this standpoint, cable is in the market of providing access to its subscribers. It is a monopsonist, acquiring program product for its pipeline. The existence of a second multi-channel provider does not necessarily provide competition in the market for access to cable households. This is especially true where you have several different multi-channel providers, serving different parts of the community.

For example DBS -- if it ever is a reality -- may provide competition to nationally delivered program services, but it will not provide additional competition for the local distribution of local product. Thus, DBS penetration levels should not be given significant weight in measuring local competition.

Accordingly, while the definition of effective competition is appropriate for triggering the need for rate regulation, it should be made clear that it does not obviate the need for must-carry or channel positioning requirements.

G. Leased Commercial Access

INTV supports the provisions in S. 12. Leased commercial access has not been an effective means of securing access to cable.[90] Its failure is due to the fact that Section 612(d) explicitly provides that in any action brought challenging the price, terms or conditions for leased access "the court shall not consider any price, term or condition established between an operator and an affiliate for comparable services. Precluding a comparative analysis of the terms of leased commercial access to other cable channels totally gutted the effectiveness of the provisions. The importance of this section is evidenced by the fact that stations dropped from cable systems rarely used commercial leased access as a means of getting back on the cable. There is no evidence that broadcasters have been successful using this provision to gain access to cable systems.

A certain number of channels should be devoted to leased access. The Commission should be given the authority to review the terms and conditions of leased commercial access arrangements.

90/ Oversight of Cable TV: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce Science and Transportation, 101st Cong., 2nd Sess (November 17, 1989) at 380 (Statement of Preston Padden, President, INTV).

H. Agreements Between Cable Operators and Video Programmers

INTV recognizes that this provision caused considerable problems during the last session of Congress. Obviously, competition from new multi-channel competitors can never be realized if they are denied access to programming. This entire debate is tinged with irony given the fact that the cable industry thrives on obtaining free programming from local broadcasters.

Nevertheless, while recognizing the importance of this issue, INTV requests that it not become the crucible for the entire legislative package. Local television broadcasting is the only existing competition to cable television. Unless action is taken today, our competitive viability will be placed in jeopardy. If problems with this provision arise, we suggest that the Senate move forward with a must-carry and channel positioning bill based on the provisions contained in S. 12.

VIII. CONCLUSION

INTV applauds the Subcommittee for holding these hearings. We urge prompt action on S. 12.

Senator INOUYE. Thank you very much, Mr. Hedlund.

Cable systems pay to carry all program services, except over-the-air broadcast services. Should cable be required to pay for local television signals?

Mr. FRITTS. Mr. Chairman, I think as we take a long- term view of the changes taking place in the video marketplace, that certainly has to be something that is considered.

It seems fundamental to me that a broadcaster, and I think Senator Packwood made this point with the earlier panel, should have the right to control who uses its signal and under what terms.

Obviously, we have concerns about losing the safety net, if you will, which we referred to in the must-carry area, and you are addressing that in S. 12.

But we believe a fundamental part missing from S. 12, quite frankly, is the opportunity for a broadcaster to be able to control retransmission rights, if you will. This is separate and apart from the compulsory license.

Our proposal would not involve changing the compulsory license or turning the marketplace upside down in any shape, form or fashion. We believe that is fundamental. And if you are going to have a robust and competitive marketplace in the future, I think it is a very necessary element of S. 12.

Mr. HEDLUND. My answer is yes, that broadcasters should receive compensation for the value they provide cable operators.

I think if there was any disagreement, and there may be none, between Eddie and me is simply the form that that should take.

Mr. FRITTS. I might add that that does not necessarily mean payment to broadcast stations. As Mr. Kennedy pointed out, it could come through joint arrangements in any number of areas, promotional announcements.

We would propose that a negotiation take place between the broadcaster and the cable system. Right now, we do not have the right to do that.

Senator INOUYE. I know that both of you are opposed to relaxing rules that would make telephone entry into cable systems easier.

Can you tell us why?

Mr. HEDLUND. I would say, Mr. Chairman, that we are not necessarily opposed to the restrictions that need to be changed in order for the telephone companies to enter the business.

We are opposed to letting them have any role in the content of what goes down that telephone company-owned wire because we think that was really the fundamental public policy flaw, in dealing with the cable industry. Cable no longer simply has an interest in giving the consumer what the consumer wants, but they have an interest in providing the consumer what they want them to see because of their equity ownership of those programs.

And if the telephone companies would renounce their interest in being in the content business as well, I do not think they would have a lot of opposition from the broadcast industry.

Mr. FRITTS. If I may, my response to that would be, in the best of all worlds, cable would be regulated as a common carrier without vertical and horizontal concentration and integration.

But we do not see the Congress rolling back the clock on that issue. What we are suggesting is that you not make the same mistake twice with an even larger and more powerful entity, the phone companies, as allowing them to be involved in the packaging and programming of signals that come through their conduit.

Quite frankly, the phone companies—the baby Bells—are seven of the most vibrant businesses in America and they have done it under the common carrier model. We would like to see that retained for the future.

Senator INOUYE. Mr. Fritts, you had four suggestions. May we have copies of the amendments?

Mr. FRITTS. We will be glad to submit copies of these amendments.

Senator INOUYE. I would like to study them if I may.

Mr. FRITTS. Thank you sir.

Senator INOUYE. Senator Packwood.

Senator PACKWOOD. Eddie, I want to follow up on this pay for transmission. I think you and Mr. Hedlund, apart from the forum, you both said yes, we think that is fair. Mr. Kennedy alluded to that but then when I pushed him a bit I was not quite sure that he was there.

Are you willing to say, okay, we will run the risk of a level playing field and if they do not want to pay, they do not have to carry us.

Mr. FRITTS. I think U.S. policy makers need to realize that cable has a virtual strangle hold on the marketplace. They have great incentives to discriminate against broadcasters and the record is replete with, time and again, those things happening.

If we are to have a stable marketplace and a smooth transition, we need a safety net allowing broadcasters to choose, either to be on a must carry, no pay, no negotiation basis,or, if you would, to have an opportunity to say, I waive my right to must carry and I would like to negotiate directly with my cable systems. This option play is an entirely fair and equitable proposition.

Senator PACKWOOD. How is that fair, Eddie? Those stations that nobody wants, they say must carry. Those that somebody will pay for, they say, no we think we want to bargain.

Mr. FRITTS. I think that——

Senator PACKWOOD. I mean, that is the best of all possible worlds all right. It is a win, win, win.

Mr. FRITTS. It is clear to me, Senator Packwood, that every station has an audience. It may not be the most popular audience, but certainly every station is obligated to serve its local community. And without access to that community, obviously, some stations would not be able to do that.

Senator PACKWOOD. Right. Let me ask you. You see, I do not understand. It would seem to me in 95 percent of the areas, where over the air stations can be reached over the air, that a cable broadcaster is going to want to carry the local station.

Mr. FRITTS. Then they should not mind an imposition.

Senator PACKWOOD. No. And the local broadcaster should not then require a must carry. Because, if you put it out over the air and if cable does not carry you, and you are carrying any kind of programming people want, they will watch you on the air.

Mr. FRITTS. Well, I do not know how your system works or whether you are hooked up to the cable, but I am. And I do not have an A/B switch on my system. And when I want to watch an over the air station, I have to go back and entirely unhook the cable from behind the television set and rehook an antennae to it. So I am constrained for those sets that are hooked up to cable, I have to watch through the cable system. There is no ability for me to do otherwise.

Senator PACKWOOD. And is that your sole argument, a technical argument?

Mr. FRITTS. Well, I think it is a practical argument if nothing else. We think that we are going through a great transition in the communications marketplace. We support a safety net of allowing stations to make the choice of whether they would like to have must carry, and if they would say, yes, I would prefer to have must carry, then they have no claim on a rate transmission right.

Senator PACKWOOD. I understand that.

Mr. FRITTS. That is the proposal we would like to——

Senator PACKWOOD. If all television sets had an A/B switch, would that satisfy you, and people can switch back and forth easily?

Mr. HEDLUND. Even the cable industry, when the commission proposed that as part of some interim must carry rules a couple of years ago, came in with voluminous filings, saying that A/B switches would not work.

Senator PACKWOOD. Oh, no. Well, it will work. They did not like it.

Mr. HEDLUND. Well, it works. But remember, there are a lot of areas where over the air reception of signals that can be very close by and certainly licensed to serve the market, are very difficult if not impossible to receive.

Senator PACKWOOD. That I understand.

Mr. HEDLUND. There are more and more zoning regulations intended to outlaw outdoor antennas because they are unsightly.

Senator PACKWOOD. I understand all of that. What you are coming back to saying is, for those stations that cannot be seen well, they ought to be required to be carried by cable. And for those that can and can negotiate, and the strong local ones, let them negotiate.

Mr. HEDLUND. In most instances, I think you would find that all of the stations are either fairly well receivable or not. In other words, it is the tall buildings in Manhattan, it is the community down in the mountains where virtually all of the signals in the community that are difficult to see.

I would go back to your really earlier question. I think your proposition is a fair one if there were more than a single buyer in a market. If there were two cable systems in every town. Then I think my stations would be quite willing to take their chances because then there are a couple of stores you can go to get your product on the shelf.

It is a little difficult when you have got a single buyer. You have got to remember, when we talk about stations "nobody wants to watch," at least speaking for my members, virtually everyone of them has higher audience ratings than any of the cable services, save CNN in the middle of the Gulf coverage.

Senator PACKWOOD. Say that again.

Mr. HEDLUND. Virtually all of my members have a higher audience rating than any of the cable program services that the cable operator pays for. The point is, there is a disincentive to carry local stations because the cable operator is in direct competition with those stations in the sale of advertising.

Senator PACKWOOD. But all of the local stations have higher ratings than the cable stations, the cable carrier usually.

Mr. HEDLUND. Virtually all. I will say, we do not——

Senator PACKWOOD. What on earth, then, would a cable carrier do if the three principal networks, or four now, the local affiliates simply said, none of us are going to sell it to you? You cannot carry us and we will not sell it.

Mr. HEDLUND. They cannot say that collectively. They must all say that independently.

Senator PACKWOOD. They cannot say it in conspiracy. That is correct. What would happen to a local cable television station if they could not carry the principal network affiliates?

Mr. HEDLUND. Well, I would add to that, principal network affiliates and the strongest independents in the market, which basically add up to about the same rating as anyone of the networks, I do not think they have a business.

Senator PACKWOOD. So they would have to buy.

Mr. HEDLUND. They would have to buy some of them, that is correct. Put it this way, I do not think they could survive without them, whether they could not find a way as a single buyer in the market to reach an agreement with, let us say, the NBC and ABC affiliate in town, and then tell CBS, you know, your competitors are going to be on my cable system, reaching all these viewers.

But if you want to have quality or equality in terms of reaching viewers or access to them, it is going to cost you. And I think that is the inherent danger when there is a monopsony, a single buyer of a product in a market in multiple sellers.

Mr. **FRITTS**. Senator, if I could add to that. As we have seen the marketplace change since 1984, we are also seeing it change toward the 1990's. And if you take the long view, we are seeing a migration of programming from free television to subscription, cable television. And finally, as in the case of the recent NFL announcement pay per view television.

I will certainly subscribe to your comments earlier about the additional features that cable has brought to the American marketplace, and I think they have done a marvelous job of doing that. I would also suggest that they are now encroaching, if you will, on what has been traditional broadcast programming, in a rather aggressive fashion.

Senator **PACKWOOD**. Did they not do that, Eddie, with boxing and is America the lessor for it?

Mr. **FRITTS**. Well, I do not know that boxing was as fundamental to all of America, with all due respect to those in that sport, as television is to——

Senator **PACKWOOD**. I mean boxing on television.

Mr. **FRITTS**. I understand that.

Senator **PACKWOOD**. And we use to all watch it on Friday nights. And we use to see Cassius Clay, nee Mohammed Ali.

Mr. **FRITTS**. Well, I think in isolated instances, it probably does not register with the viewer. You can see major migrations. For instance, in Eureka, CA, there are two television stations. One of the television stations had carried the most popular syndicated programming, the Wheel of Fortune, Jeopardy, et cetera.

All of that programming is now on a individual cable channel. To the extent we have been able to verify the facts, it is our understanding that the bidding process took the broadcaster out of it and that the syndicator never even returned the phone calls to the other station in the market who wanted to bid on that.

So that programming has gone all to cable now. It is no longer over the air.

Senator **PACKWOOD**. Is America the lessor for that?

Mr. **FRITTS**. In that one instance in Eureka, CA, where they have 90 percent cable penetration, probably not.

If you spread the same scenario over a multiplicity of cities and the thousands of communities in America——

Senator **PACKWOOD**. What I meant is, is America the lessor if they cannot see Wheel of Fortune?

Mr. **FRITTS**. Well, I am not going to comment on that, Senator.

Mr. **HEDLUND**. Senator, I think that any single isolated example, boxing on television, which is probably a more natural for a pay per view medium, because one never knows how long the fight will go and it is a little hard to support it with advertising if it might end with a first round knockout.

And whether it is Wheel of Fortune, one particular package of movies from Paramount, let us say, I think the answer is no. But you know, it is a little bit—and I do not want to stretch this too far—like litter. If you are the only person who throws something out their car window, you are not really going to make America's roadsides ugly.

But, one here, another there, another there, and eventually, the foundations of free television slip because people are watching cable because the most popular programming is now on cable. It simply means that the free broadcaster, who about 40 million people in this country or families rely on for television because they cannot afford or do not have access to cable, becomes a lesser and lesser service because of that. So it is cumulative.

Senator PACKWOOD. Thank you, Mr. Chairman. I still think that they ought to pay for your signals and we should not have a spectrum fee.

Mr. FRITTS. We will endorse that, Senator. Thank you.

Senator INOUYE. Senator Breaux.

Senator BREAUX. Thank you, Mr. Chairman.

Mr. Hedlund, I want you to know that my 19 years in Congress, this is the largest volume of testimony I have ever seen submitted. After I looked at it I almost felt like breaking in two, let your fingers do the walking or something. This thing is a telephone book.

Mr. HEDLUND. It shows how long the quest for cable legislation has gone on. That is simply a compendium of all the stuff we have filed in past years.

Senator BREAUX. Start putting it all on computer.

Let me pursue, I think, a little bit of what Senator Packwood touched upon, Mr. Fritts, with regard to one of the points that is not in the bill but I think you raised in your testimony on page 3 when you talked about some of the things that you feel are needed.

And the third one was the right of broadcasters to control the retransmission of your signals, your only commodity. I guess we are basically talking about the ability to charge the cable companies a fee for carrying the broadcast signals. Is that what we are talking about, essentially?

Mr. FRITTS. Senator Breaux, I think everyone, generally, assumes that is what we are talking about, but it may not necessarily be monetary. It could well be an arrangement with a cable system where they provide an additional channel as Mr. Kennedy pointed out earlier. Or it may be where they have promotional announcements helping promote news. Or it may be nothing. It could be that there is a stand off and they cannot reach an agreement. And nothing may happen.

We believe very strongly in the concept. Broadcasters are the only medium not allowed to control their own signal after it leaves or under what circumstances it is used.

Senator BREAUX. Let us pursue the concept that I think I feel that you base your advertising rates on your number of viewers. Your number of viewers are substantially increased by the carrying of that program over cable. Therefore, you are able to charge a great deal more because you have a great deal more advertisers.

Say, no cable system in a country carried a broadcast signal from a network. I mean, how much of a reduction in your viewers would that amount to in terms of numbers?

Mr. FRITTS. Well, if you go back to what cable started as, a community antennae television service, broadcast was universal to the American public. It still is in one form or another. Unfortunately, when the cable people make the cable hook-ups, they often clip the antennae wires, and you end up with no access to an antennae. So you are totally dependent upon the cable as a transmission conduit.

As a result, I would submit that most of those families would have been able to watch that over the air.

Senator BREAUX. I think we may be off in a different—the point I am trying to make is, I think the broadcasters benefit financially right now by the cable carrying their broadcast signals because it reflects the number of viewers you have and that is reflected in your advertising rates.

Mr. FRITTS. But what I am saying is those viewers would have been there without cable. But now that cable is there and they have disconnected the system of free over the air television, they have a monopoly strangle hold.

Broadcasters have to go through that conduit as a necessary evil of technology, if you will.

Senator BREAUX. Well, right now, without the ability to charge for the broadcast, are you better off financially with them carrying your broadcast signal? Or are you not as well off because you cannot charge?

Mr. FRITTS. I think if you take the long view, Senator, as to the amount of programming that is migrating from broadcast to cable, and updated to pay per view, you see what the goal of cable is. And if you look at the projections that say that 75 percent of Americans will be subscribing to cable in the year 2000, some 8 1/2 years from now, then you are looking at America being cable dependent, if you will, in large measure.

Senator BREAUX. Well, if that is the case, if everybody is watching cable or that is the direction you say we are moving into, I probably agree with that. I mean, that is where your viewers are and that is how you get paid for it. You say, I got 300,000 homes watching my local station. All of them are watching it on cable.

Therefore, Mr. Advertiser, I am going to charge you based on everybody in the city watching my station on cable television. Pay me what that viewer audience is worth. I mean, that is how you get paid is what I am saying.

Senator BREAUX. Well, you have a very competitive marketplace with over the air broadcast stations. And each station can claim that same number of households if they are on cable.

Mr. FRITTS. Well, one would claim a better product, hopefully.

Senator BREAUX. One would claim a differentiation in the product, clearly. But as we look at where we are going in the long term, one has to say, how are broadcasters going to be able to bid against the cable monopoly for the same programming that now is migrating from broadcast back to cable. And our ability to bid for that programming is greatly diminished in the long term.

And we see that coming. It started as we were trying to discuss this particular subject before this committee several times in the last session of Congress.

Mr. HEDLUND. I would just——

Senator BREAUX. I am sorry. Let me finish up on this one. I am just not convinced, and maybe I can be, of the necessity for a cable system paying for carrying a broadcast signal. I remember quite well the arguments that you have to carry it, please carry it, you must carry it, and by golly, you are going to do it for free.

I mean, of course, we want you to carry it and now that we have more viewers, you have more advertising revenues as a result of more viewers. But now you are advocating that the cable systems would also have to pay for carrying you. And I would argue that you are already getting paid by them carrying your broadcast signal because you have a larger number of advertisers and your rates are based on advertising volumes.

Mr. FRITTS. Our rates are based on what the competitive market will bear, and the market has been greatly fragmented by virtue of cable over a period of years. We see that taking place in an exacerbated manner in the future, particularly as cable penetration rises to the 75 percent level, and a broadcaster cannot sell X number of homes if the station across the street, or the cable channel next door, is competing.

There is a hotly competitive market for advertising, and while in some instances cable will say they expand our reach, and they oftentimes say that they enhance the signal, and sometimes that is true, but sometimes the reverse is true, that they actually degrade the signal in some instances, and that has been proven a number of times.

Senator BREAUX. Mr. Hedlund?

Mr. HEDLUND. Sir, I would not disagree with the direction in which you are going. A lot of my members would agree, because there are UHF stations which have some inherent disadvantages over VHF stations. They are oftentimes born into a market where they are the first UHF stations and people do not know how to tune a UHF station and in those instances cable has been beneficial.

But on the other hands, the broadcasters—the independent and network affiliates and public stations—provided cable with a product to sell. All I am suggesting is that most commercial transactions have benefits running in both directions. The question is, is the benefit going in this direction equal or larger to the benefit going in the other direction?

Senator BREAUX. That is the point I am making. Are you better off not paying anything and not having them carry you, or are you better off having them carry you everywhere and not paying anything? I think the argument would be that you are much better off being carried by the cable, even if you do not pay anything, than the other situation.

Mr. HEDLUND. A substantial number of my members would agree.

Senator BREAUX. Especially for your stations.

Mr. HEDLUND. A substantial number of my members would agree with that. On the one hand, we represent some small, struggling UHF independents that maybe have been on the air a couple of years. We also represent some very powerful VHF independents who have been on the air 40 years, so that there is a divergence in any trade association.

Senator BREAUX. I thank the panel. Thank you, Mr. Chairman.

Senator INOUYE. Senator Gore.

Senator GORE. Mr. Chairman, thank you, and thank you for your stamina and patience in this hearing.

I was listening to the last exchange, and I was hearing you say something, Mr. Fritts, that I think is not getting across as much as it should.

When broadcasters compete with cable systems for the purchase of new programming, or for the purchase of events like the University of Tennessee football games, or the Super Bowl, or the regular NFL season, or the regular baseball season, the cable company's ability to take that programming off of free television and charge for it by bidding a higher price is in substantial measure due to the fact that they have two revenue streams, not one.

One of their two revenue streams is mostly coming from the resale of your product, which they get from you basically for free, and so while it may not look like a big deal at any given moment in time, over a period of time, it has a tremendous effect.

The programs that are most desirable, most able to attract the largest audience, will inevitably, if this arrangement persists, move off of free TV and onto cable TV, and toward pay per view TV. That is essentially the problem, is it not, with the continued arrangement which allows cable to resell your product without paying you anything for it?

Mr. FRITTS. Senator Gore, I think you capsulized that better than, perhaps, I did, and I thank you for that. But you are exactly right, and that is what is happening, and the evolution is marching on.

I would submit there are three revenue streams from cable, not just two. One is the subscription base, the other is the advertising base which is very significant, and predicted to be the largest growing base. I must tell you that all of that advertising base they are generating comes directly from the broadcast industry. And number three they have the pay-per-view, which is emerging as a revenue stream for them as well.

Senator GORE. And they have the extra, fourth revenue stream which is not always in cash, whereby new programmers who want to gain access to cable have to ante up. They have to submit to whatever fancy name you want to use for commercial extortion. They have to give a share of the ownership of their company—they have to give stock to the cable industry in order to gain access.

Mr. FRITTS. That has happened in many, many cases.

Senator GORE. It sure has, and it is a mark of the unnatural degree of market power that they have accumulated.

I referred in my opening statement to this migration of the NFL toward pay cable. Where do you think that is headed? How long will it be before—are we going to see a situation where you can no longer get NFL football on television unless you pay the cable company for it?

Mr. FRITTS. Senator Gore, I have a friend who is a friend of one of the NFL owners. He said to me that that is the direction the NFL wants to go. They want to make every television set the equivalent of a seat in a stadium, to sell that seat on a pay-per-view basis to the entire populous who are interested in that particular football game. That is the direction that they are moving, starting with their 1992 experiments.

I would suggest, however, that the sports leagues do enjoy certain antitrust benefits granted to them by the Congress. We are very concerned about the loss of that programming, which we pay an extraordinarily high amount of money for, I might add, and have to flow it back against the revenue base of advertising.

Senator GORE. That is right, and they also protect that monopoly by slow-walking the desire of cities not in the current arrangement to get an expansion team. We have had a lot of discussion here on this committee about that, and I, for one, was willing to give them a little time and credit and believe that they were moving in good faith toward expansion, but I have not seen any evidence that they are doing that.

So all of this needs to be discussed in the same conversation.

Mr. FRITTS. There are a lot of intertwined issues, and I think what we would like to convey to you is that there is great stress on the system of free, over-the-air broadcasting. There needs to be equity in the marketplace so broadcasters will have a fighting chance to compete. We do not ever expect to dominate in the marketplace as it is construed today and appears to be moving toward tomorrow, but we would like to be able to compete fairly.

Senator GORE. I just have two other questions for you. If the must-carry and channel-positioning provisions of this bill or some other bill like it do not become law, what can we expect from the cable industry in the years to come? It is kind of open-ended. I would like you to be brief in response. But why do we need the must-carry and channel-positioning provisions?

Mr. HEDLUND. Senator, I think we need them principally because the cable industry was allowed to become vertically integrated, where they have a vested interest in a number of the program services and therefore a vested interest in trying to focus and channel viewers' viewing to those services in which they have that interest.

They cannot have a vested interest in a broadcast station, they cannot sell commercial time on a broadcast station, and so it is inevitable that they view us as a necessity at the moment, but as soon as they feel they can safely start changing channels, moving stations off, they have got every incentive in the world to do so because they make a lot more money off of these services in which they have an equity interest.

Senator GORE. Mr. Fritts, you have spoken out against telephone company entry into the cable business. If the telephone companies were to provide must-carry status to all broadcasters, and be willing to pay for carriage of local, over-the-air signals, giving you an alternative to cable MSO behavior as we now know it, would that change your view of telco entry?

Mr. FRITTS. Let me suggest, Senator, that in fact I have not spoken out against telephone company involvement in cable. What we have said is that if the telephone companies are allowed into the business they should be allowed in as common carriers, rather than to replicate the cable model.

Specifically, we think that there possibly could be some very good opportunities for us. But I must tell you, in my estimation the phone companies will not be strong competitors to the cable systems in the short term. Perhaps in the long term. Other competitors are not on the horizon, in my estimation, to be able to contribute any large degree of market share to compete with the cable industry.

The cable industry obviously left us all feeling a little bit like brides at the altar last time, if you will. As you know the bill passed the House and was moving toward passage here when the cable industry decided to pull the plug on the compromise, and so it went down in smoke. We are back again, but at least they have been honest this time and said they are going to oppose it all the way through.

Senator GORE. You can answer this one for the record, or Senator Packwood for the record. I need to know how to operate an AB switch with a VCR, and if you can explain that ——

Mr. HEDLUND. You need a teenager.

Senator GORE. Mr. Chairman, a brief closing comment. I again appreciate you holding this hearing, and your stamina, that of our ranking Republican member. I cannot stay for the final two panels, and I am embarrassed about it, because they are going to be dealing with the issues that are quite important to me.

I want to commend to the committee the very important testimony of the remaining witnesses, Mr. Sodolski with the USTA, who will make a persuasive case for telephone entry into cable, Mr. Schmidt with Wireless Cable, Mr. Hewitt with the Satellite Broadcasting and Communications Association, and Mr. Phillips, who I referred to earlier, with NRTC, each of whom will again call for strong program access provisions in this legislation.

It is unavoidable that I have to miss their testimony. I wish that that were not the case.

But I appreciate, Mr. Chairman, the obstacles we have all had with all these votes and the planes leaving to Kuwait and all that, but I would like to thank all the witnesses and you and the staff.

Thank you, Mr. Chairman.

Senator INOUYE. Before proceeding any further, I would like to make the following announcement. The committee record will be kept open for 3 weeks—that would mean April 5—and during that period I would hope that those who have amendments will submit them to the committee so that we can circulate them to all those who are interested, and circulation time will end on 19 April, and thereafter it will be up to the Chairman and the ranking member to decide upon the date for the mark-up.

I will announce at this time that my staff has been instructed to draft amendments relating to retransmission rights.

Mr. FRITTS. We will be happy to work with your staff in that accord, sir. Thank you.

Senator INOUYE. I thank you very much, Mr. Fritts, Mr. Hedlund.

Mr. FRITTS. Thank you, Mr. Chairman.

Senator INOUYE. The fourth panel consists of the legislative director of the Consumer Federation of America, Mr. Gene Kimmelman; the president of the Community Broadcasters Association, Mr. D. J. Everett; and the president of the United States Telephone Association, Mr. John Sodolski.

On behalf of the committee, I thank you for waiting. I can assure you that your testimony will be very important to us in our deliberation. May I first call on Mr. Kimmelman?

STATEMENT OF GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. KIMMELMAN. Thank you, Mr. Chairman, Senator Packwood.

On behalf of the Consumer Federation, I appreciate this opportunity to express our views in support of S. 12. This bill is stronger from a consumer perspective than the bill your committee reported last year in two important respects. It provides greater rate protection for consumers and stronger customer service protection as well.

As far as we can see, only two things have changed in this last year that are of great importance to consumers. First of all, rates for cable service keep going up, 13 percent last year, more than twice the rate of inflation. Once again we have been hearing from the cable industry, as we heard this afternoon from Mr. Kennedy, Mr. Turner, and Mr. Mooney, that they are playing catch-up ball. They keep playing catch-up ball and it is double-digit rate increases every year. It does not look like it is stopping.

The second thing that has occurred which is of importance to consumers is that the cable industry has begun retiering its service, moving the most popular programming from its basic tier—services that consumers really want from cable—in an effort to avert regulation, making the FCC's proceeding virtually meaningless for consumers.

So there are more reasons today than ever before for you to pass legislation like S. 12.

Now, regulation gets a bad rap and we certainly have heard a lot about that this afternoon. And I can assure you, from a consumer perspective, we, more than anyone else, like to see competition.

Senator Packwood raised a number of important points before and it reminds me of trucking, airlines, many issues where we have worked together and focused on trying to bring as much competition to consumers. But I think in this instance we have an example of monopolistic practices that are very real and that are hurting consumers.

We have a few concrete instances of two cable systems in a community, as mentioned by Senator Ford this afternoon, which gives us some idea of what concrete benefits regulation would provide us if we had it today.

We have rates in the few communities that have two cable systems as low as $7, $8, $9 a month. And back to the points that Senator Packwood raised, when you do it on a per channel basis, looking at the new channels that have come on, the rates per channel are half in those systems, than they are in the communities that have one cable system.

Is this pricing below cost? In the documents submitted by the mayor from Kentucky today. Cable operators say they are not pricing below cost when charging $8 or $9 a month for all of Mr. Turner's programming plus a broad variety of 35 to 40 channels. Those prices, interestingly, are lower than the regulated prices prior to deregulation in the average American community.

So if that is what competition leads us to, it is hard for consumers to believe that those rates were artificially low in 1984, 1985. Competition would bring those rates even lower.

The concrete benefits from our perspective are that rates could be as much as 50 percent lower for the American consumer. And so I think regulation has gotten a bad rap in this instance.

While this bill, S. 12, does not provide full, total regulation, every potential squeezing out of monopolistic practices the consumers would like to see, it does provide enough protections to bring down rates, enhance service and to promote competition. And from our perspective, that is a pretty good deal for the consumer.

We urge you to report this bill as soon as possible.

Thank you.

Senator INOUYE. Thank you very much, Mr. Kimmelman.

[The statement follows:]

STATEMENT OF

GENE KIMMELMAN
LEGISLATIVE DIRECTOR
CONSUMER FEDERATION OF AMERICA

With cable rates soaring and no federal or local regulatory authorities empowered to prevent monopolistic practices, it is essential that Congress step in to police the cable industry. The Consumer Federation of America (CFA) believes S.12, the "Cable Television Consumer Protection Act of 1991," sponsored by Senators Danforth, Inouye, Hollings, Gore, and Gorton from this committee, would go a long way toward improving cable service, reducing rates and promoting competition in the video marketplace.

Rate Increases Since Deregulation

Since the 101st Congress, when it was clear to this committee that monopolistic cable industry conditions necessitated legislative attention,[1] matters have only grown worse for consumers. Cable rates rose about 13 percent last year, more than twice the rate of inflation and more than three-times the level of increase experienced during the time when cable was regulated.[2] These price hikes come on the immediate heels of the more than 40 percent basic rate increases consumers experienced during the first three years of cable deregulation.[3]

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[1] S.1880, The "Cable Television Consumer Protection Act of 1990," reported by the committee 18-1, Report 101-381, July 19, 1990.

[2] Multichannel News, January 21, 1991 at 24 citing U.S. Labor Department data; historical data from the Wall Street Journal, April 7, 1989.

[3] General Accounting Office, Follow-Up National Survey of Cable Television Rates and Services, June 1990, GAO/RCED-90-199.

With neither competition nor regulation to police their behavior, cable operators have no reason to dampen their enthusiasm for double-digit rate inflation every year.

The 1984 Act's Regulatory Straightjacket

Unfortunately, under current law, even the most diligent regulatory intervention cannot protect consumers from these spiraling rates for the most popular cable programming. Under today's monopolistic conditions, the Cable Act of 1984 allows the Federal Communications Commission (FCC) and local officials to regulate only the tiers of cable service that include over-the-air broadcast networks (i.e., ABC, CBS, NBC). See 47 U.S.C. Section 543 (b)(1). As the FCC recently pointed out in its reevaluation of the need for cable regulation, "the Commission is bound by the statutory definition which it may not vary and the provision of the Cable Act which, in the absence of effective competition, permits rate regulation of only that tier of service which includes local broadcast signals."[4] In other words, if cable operators offer cable programming -- like ESPN, Discovery, CNN and USA -- on a tier separate from the over-the-air networks, even under the most monopolistic conditions, the FCC and local officials may not regulate the price charged for cable programming.

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[4] Further Notice of Proposed Rule Making, In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Dkt No. 90-4, released December 31, 1990, at Footnote 9.

It is important to remember that most consumers subscribe to cable to watch cable networks that are not available over-the-air. While a very small percentage of consumers need cable because they cannot receive broadcast signals over-the-air, it is the convenient package of over-the-air signals retransmitted with other unique and diverse programming that makes cable increasingly desirable to consumers.[5] Ironically although consumers subscribe to cable to receive programming they cannot get over-the-air, the 1984 Cable Act allows the FCC and local officials to regulate prices for only the networks consumers receive over-the-air for free.

Not surprisingly, the vast majority of cable companies are taking advantage of this obvious flaw in the 1984 Cable Act to avoid regulation of the cable programming that attracts the most subscribers, e.g., ESPN and the Turner Networks. ATC (owned by Time, Inc.), which controls cable systems serving about 15 percent of cable viewers, announced that at least 65 percent of its systems had a broadcast tier separated from popular cable programming in 1990.[6] TCI, which owns cable systems reaching nearly 25 percent of cable viewers, has also begun separating the most popular cable programming from its broadcast retransmission tiers, as has Jones Intercable.[7] Virtually all of Continental's cable systems have separated popular cable programming from a broadcast, over-the-air tier, as have 50 percent of Paragon's systems and 40 percent of Cablevision's systems.[8]

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[5] See Statement of Gene Kimmelman on Media Ownership - Diversity and Concentration before the Senate Communications Subcommittee, June 21, 1989.

[6] Matt Stump, "Cable MSO's: Back to the Future with Tiering," Broadcasting, May 21, 1990 at 35.

So even if the FCC revises the definition of effective competition to allow local regulation of all cable systems, the cable industries' ability to retier services has made the Commission's regulatory action virtually meaningless. If the FCC accepts all of CFA's proposed changes to the definition and test for "effective competition,"[9] cable operators who have retiered their programming will still face no regulatory restraint on prices charged for the very services -- ESPN, Discovery, CNN, USA and the Turner Networks -- that cable has monopolized.[10] If Congress agrees with CFA that cable companies should not be allowed to charge monopolistic prices for any cable programming regardless of tier, it is obvious that legislation, and not FCC action under the 1984 Act, is needed to protect consumers.

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[7] Stump, op. cit.

[8] Id.

[9] Comments and Reply Comments of CFA and TRAC In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Dkt No. 90-4, February 14, 1991 and March 1, 1991.

[10] Of course the Commission's proposed "effective competition" test would not even provide this minuscule consumer protection since its "six signal test" would only allow local regulation of broadcast signal tiers covering 34 percent of subscribers. Further Notice, op. cit., at Footnote 33.

Monopoly Conditions Lead to Excessive Rates

The cable industry argues that there is no need for legislation because over-the-air networks, video rental stores and movie theatres compete with cable. This is like saying that bicycles compete with cars. A bicycle may get you around the block as easily as a car, but not across town, carrying a load or travelling longer distances when time and ease matter.

Similarly, broadcasters only compete with cable for network programming. If consumers want a broad package of television programming in addition to the over-the-air broadcast networks, there is only one way to get it: from cable. If consumers want to see their elected representatives on C-Span, watch a full range of sports on ESPN or see news all day on CNN, they must purchase cable.

One can, of course, attend major sporting events, go to the theatre or rent movies periodically. However, as in the bicycle/car comparison, these alternatives to cable are, on a day-to-day basis, considerably more cumbersome, impractical and significantly more expensive than cable. As the Commerce Department noted in its comments to the FCC, "... two services that are occasionally mentioned as potential substitutes for cable service -- movie theatres and rental movies (played on home VCRs) -- do no appear to possess the characteristics necessary to be effective competitors to basic cable service."[11] TCI admits that even with over-the-air TV, video tapes, sporting events and movies available in a community, "the cable system can still have monopoly power in the economic sense that it does not face the full effect of competition because it is the sole source of cable services."[12]

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[11] Comments of the National Telecommunications and Information Administration In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable

Since there is no effective competition or regulation in today's market, cable companies can pad their rates without fear of losing customers. Econometric studies show that, if cable companies were subject to the pricing pressure of a fully competitive market, cable rates would be about 50 percent lower and consumers would save approximately $6 billion per year.[13]

The fact that rates are much lower in the few communities with competition supports our claim that cable service is significantly overpriced. Two recent analyses show that cable rates in communities with two competing systems are about 20 percent (more than $3/month) lower than in communities with one cable franchise.[14] More importantly, when measured on a per-

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Television Basic Service Rates, MM Dkt No. 90-4, at Footnote 45.

[12] Reply brief for Telecommunications Inc. at Footnote 70, Telecommunications, Inc. v. Commission of Internal Revenue 95 T.C. 36 (November 7, 1990) (Dkt. No. 268-89).

[13] Statement of Gene Kimmelman, op. cit.

[14] John W. Merline, "How to Get Better Cable TV at Lower Prices," Consumer Research, May 1990; and Stanford L. Levin, "Cable Television and Competition," presented to the Sirth Conference on New Directions for State Telecommunications Regulation, Salt Lake City, Utah, February 10-13, 1991.

channel-cost basis, cable rates per channel of service are 50 percent lower in communities with two rather than one cable system.[15]

The logic of cable's monopoly power and ability to overprice cable service (i.e., extract monopoly rents) is best described by the cable industry itself:

> Dr. Malone and Mr. Hosteller, businessmen who operate cable systems, agreed that a cable operator serving a city has a monopoly in the sense that customers desiring cable service will have no choice regarding the provider of that service. (Tr. 57, 63, 135-36)
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> * * * * *
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> The value of a cable franchise follows from the protection from competition that it provides the holder. Since the holder of the franchise will have a monopoly, the prospective cable operator would be able to generate a cash flow that would result in a supernormal return on his investment in assets other than the franchise (the cable plant, office equipment, going concern value).
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> Finally, because the franchise limits the customers to a single provider in the market, other "customer-oriented" intangibles relating to the expectation of future patronage do not exist for a cable system. There is no goodwill in a monopoly. Customers return, not because of any sense of satisfaction with the monopolist, but rather because they have no other choices [footnotes omitted].[16]

Since competition to cable monopolies cannot develop over night, CFA believes it is essential for Congress to reinvigorate the best surrogate for competition -- regulation -- to bring down cable rates to a reasonable level as soon as possible.

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[15] Merline, *op. cit.*

[16] Reply brief of Telecommunications Inc. at 147-8, 149-50, and 154. *Telecommunications, Inc. v. Commission of Internal Revenue*, 95 T.C. 36 (November 7, 1990) (Dkt. No. 268-89).

Anticompetitive Practices

To preserve their local monopolies, many cable companies have joined forces through consolidation and vertical integration to control popular video programming and access to the bulk of cable viewers. For example, the two largest cable operators, TCI and ATC, own cable systems that cover about 40 percent of cable subscribers nationwide and have an ownership stake in numerous networks, including CNN, WTBS and Headline News.[17]

These vertically integrated, horizontally concentrated cable companies protect their monopolies by refusing to sell popular programming to potential competitors at reasonable prices. For example, Commerce Department data show that ATC discriminates against cable rival Viacom by favoring affiliated programmers HBO, Cinemax, USA and Black Entertainment Network.[18] In return, Viacom engages in the same type of discriminatory practice.[19]

Similarly, satellite and wireless cable distributors claim they cannot compete with cable because cable companies refuse to sell popular, cable-owned programming at a reasonable price.[20] Since consumers want the same programming from satellite and wireless vendors as from cable companies, these potential competitors are dependent upon the cable industry to sell cable-owned programming. So far, satellite and wireless have made little headway in their effort to compete with cable.

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[17] Statement of Gene Kimmelman, op. cit., at 6-13.

[18] Id., at 16-18

[19] Id.

[20] Id., at 14-15

Senator Danforth's Bill

S. 12 would put an end to cable's monopolistic practices by promoting competitive alternatives to cable while reimposing regulation until those alternatives develop. Although this legislation will not eliminate all concerns about inappropriate cable industry practices, it would protect consumers against unreasonable rates and poor service while promoting increased competition. For example, the bill would:

1) Ensure reasonable charges for installation, rental equipment and a small basic tier consisting of the networks, an independent and PBS station;

2) Provide full regulatory protection against unreasonable prices for the most popular package of cable services, including ESPN, CNN, and the other Turner Networks;

3) Grant favorable channel positioning for local network affiliates and independent stations;

4) Establish balanced federal and local authority over cable customer service;

5) Guarantee access to cable programming for satellite dish users who, in general, have no other method of receiving a broad package of video services;

6) Expand access to cable programming for potential competitors to cable companies (e.g., wireless cable, K-band direct broadcast satellite) to promote video competition;

7) Direct the FCC to prohibit vertically integrated cable companies from favoring their affiliates or discriminating against potential competitors through inappropriate contractual arrangements (e.g., refusal to deal, conditioning carriage on a financial interest in programming);

8) Direct the FCC to prevent cable companies from impeding competition by expanding horizontally to the point of concentrating market power through controlling access to a large percentage of cable subscribers; and

9) Require cable operators to lease channels to third parties at fair and reasonable prices, terms and conditions.

Conclusion

CFA believes legislation is needed to curb cable industry excesses and correct flaws in the 1984 Cable Act. S.12 would put an end to monopolistic cable practices, open the door to competition, promote improved cable service and help reduce rates. We urge you to report this bill as soon as possible.

Senator INOUYE. Mr. Everett?

STATEMENT OF D.J. EVERETT, III, PRESIDENT, COMMUNITY BROADCASTERS ASSOCIATION, MILWAUKEE, WI

Mr. EVERETT. Thank you. My name is D.J. Everett. I am general manager of TV 43, a low-power television station in Hopkinsville, KY.

I speak to you today in my voluntary role as president of the Community Broadcasters Association, representing the low- power television industry.

Low-power television stations or community broadcasting stations, as we prefer to call them, all across this country are providing local service to geographic areas and to specialized audiences which are not large enough to support traditional high-power stations.

In Hopkinsville, Kentucky, where our station is located, the closest high-power stations are 60 miles away in another State. Here in Washington two lowpower stations serve the Hispanic community.

S. 12 excludes low-power or community broadcasting stations in the must-carry requirements. Many cable systems will not carry community broadcasting stations. Our members tell us that is because they offer competition to the cable systems in the sale of local advertising commercials, which the systems insert on their satellite channels.

If the systems do not carry the community station, the station cannot succeed. And the cable system, thus has an exclusive franchise on the sale of local TV advertising in many communities. Unfortunately, the only local television service that many communities will ever have is also eliminated.

Some cable systems will carry community stations for a fee. The current average, according to a Marquette University survey, is $7,000 a month, which is clearly prohibitive. Some systems tell our members they are full, but then always find a place for another profitable satellite-delivered service or another home shopping channel.

S. 12 already requires each cable system to set aside a certain number of channels for local broadcast stations. Our community stations are local broadcast stations, duly authorized by the FCC at the behest of Congress.

We believe that those community stations meeting certain standards should be given mandatory must-carry status. In addition to a local programming requirement, those standards should include many of the same FCC requirements that high- power stations meet, such as minimum operating hours, non- entertainment programming, election issues, controversial issues, lowest unit rule, editorials, children's programming, and equal employment opportunity. We are already subject to some of these rules in addition to over 60 other sections of FCC regulations.

We ask for this must-carry status only on those channels that S. 12 already designates for local broadcasters, which are not filled after a system has on it all of the high-power stations it is required by the legislation to carry.

We do not seek in any event to be carried in place of a qualified high-power station, only in addition and only on those channels already designated for local broadcaster use.

There are presently a few hundred stations which would meet the criteria we have set out here. Community television is substantially a mom and pop business. If potential operators knew they would be carried by cable, more stations would be built and more communities would receive the true local television service that they will otherwise never have.

For these reasons we hope that you will make the changes we are requesting in S. 12 to ensure the future of this industry that you urged creation of 11 years ago. This is America and it is the American way to better ourselves. Class A FM radio stations and daytime only AM stations have received increased coverage in order to better reach their local audiences. Low-power television deserves the same opportunity through cable carriage.

The stated purposes of S. 12 can be fully accomplished only if community television stations are included in must-carry. Otherwise, our industry may be doomed.

In reference to the other proposals currently being discussed regarding the must-carry issue, CBA's position at this time is that community stations do not desire to either pay or to be paid for cable carriage. We just want on the cable so that we can serve our communities with local television service.

Thank you.

Senator INOUYE. Thank you very much, Mr. Everett. May I suggest that you submit your amendment to the committee so we can look it over?

Mr. EVERETT. I will be glad to, sir.

Senator INOUYE. Now may I call on Mr. Sodolski?

STATEMENT OF JOHN SODOLSKI, PRESIDENT, UNITED STATES TELEPHONE ASSOCIATION, WASHINGTON, DC

Mr. SODOLSKI. Good evening, Mr. Chairman, Senator Packwood.

My name is John Sodolski and I am appearing here as president of the United States Telephone Association.

As I listened to today's witnesses discussing many of the same issues that were debated at great length last year, two things occur to me.

First, I represent the largest segment of the cable industry that has neither price nor service problems. The 200 local telephone companies that are providing cable service subject to the rule exemption have not been the source of rate or service complaints that have plagued the rest of the cable industry. Our companies' customers are not the reason this committee is holding a hearing on S. 12.

Second, I represent that industry or that segment of the telecommunications industry that is ready, willing, able to bring the full promise of new broad-band telecommunication services to the American consumer if freed of restrictions.

It is critical that Congress focus its efforts on encouraging competition and innovation. These forces, far more than regulation, will ensure that consumers have access to a variety of new services, many of which cannot possibly be imagined at this time.

History had repeatedly shown us that the American marketplace, and in turn, American consumers, benefit from competition. Competitive forces operating in a free and open market encourage service providers to deliver a high level of quality while maintaining reasonable prices.

Competition means greater diversity and freedom of choice for buyers and the opportunity for growth and prosperity for sellers.

In 1984 the Congress deregulated cable in anticipation that competition would develop, a reasonable premise under those circumstances. However, at the last minute the House proposed and the Senate accepted a prohibition on the other viable wire-line competition to cable, local telephone companies. The result? An industry which was deregulated in anticipation of competition, yet has had no genuine competitors. Nor does it appear that competition will arrive in the near future.

Since the committee acted last year on the cable bill, it appears that one of the most promising competitors, Skycable, has thrown in the towel.

Without permitting competition, the Government will simply be sanctioning the cable monopoly. Reregulation alone will not stop consumer complaints. Competition or even the threat of competition can drive down inflated cable rates.

Moreover, competition can stimulate the use of innovative technology and improvements in service.

As you consider reregulation and the role of competition, we urge you to consider what telephone companies can offer via a broad-band network. The same telephone companies which make our local telephone service the most dependable in the world, the same telephone companies which have made cellular telephone service a competitive, consumer-driven technology stand ready to open up competition in cable television to America's consumers with the added benefit of adding a wide array of other new services.

When cable operators deploy fiber and expand channel capacity, which they are doing, they retain control over that expanded capacity. The telephone company broad-band networks place control in the hands of the customer and third parties.

But all customers will not have to wait for years for the benefit of this technology. Telecos are not just talking about deploying broad-band services, they are doing it. They are doing it in places like the rural Pan Handle of Oklahoma where an existing copper infrastructure has been enhanced and replaced by a fiber network linking the community schools. They are doing it in Cerritos, CA, where a fiber to the home experiment is underway and has proven successful.

Deregulated, and with no legitimate competition, the cable industry has spent a good deal of their customers' money executing every possible legal, regulatory, and legislative maneuver to keep telephone companies from entering into or even experimenting in the provision of cable services.

Indeed, cable interests are actively intervening in State regulatory proceedings in an attempt to preclude telephone companies from deploying fiber for whatever purpose.

Moreover, the cable industry is aggressively spending dollars collected from cable rate increases on an experiment of its own, personal communications networks or PCN. Large cable MSO's are moving ahead aggressively to develop this technology with one goal in mind, to compete for local telephone customers in selected, high-volume areas of the country.

The National Cable Television Association has raised a series of objections to telephone companies participating in PCN technology. Once again, cable wants to hide behind the law to protect itself from competition.

I have got a question for this committee. If telephone companies need a waiver from the FCC to provide a video service, as is the case in Cerritos, why then does Time Warner not need a waiver to provide PCN telephone service in Cincinnati? Yet the FCC has granted Time Warner's experimental license, and licenses to a number of MSO's, without such a waiver.

It is curious that the cable industry is moving into the telephone business at the same time they are fighting to keep us out of the cable business. We would like to see that the rules are the same for everyone.

When you consider cable legislation, please consider the following questions.

Do you want to lock in the very rate increases that created the consumer outcry or should you provide for real price and service competition?

Should Congress enact a policy which fails to correct the principle shortcoming of the 1984 act, the teleco ban and by failing to act, continue to deny entry to cable's only viable competitor?

Should Congress continue to prohibit the segment of the telecommunications industry which is most ready, willing, and able to provide fiber to the home and state-of-the-art PCN services from doing so?

Should Congress undertake the extraordinary task of reregulating cable, but take no precautions to control its entry into what could be cable's next monopoly, its next consumer feeding ground, personal communications networks?

Thank you. I will be happy to take any questions you might have.

Senator INOUYE. Thank you very much.

Mr. Everett, how many low-power stations have been licensed by FCC?

Mr. EVERETT. There are approximately 950 low-power television stations licenses, Senator. All of them do not operate as locally originating television stations, however. Some of them are passive translators. We think that there are about between 200 and 300 stations operating in the direct community service mode that I described here today.

Senator INOUYE. Of the 200 to 300 local stations, how many originate programs?

Mr. EVERETT. I would say a very high percentage of that. I do not know the exact figure, but I would say a very high percentage.

Senator INOUYE. I wanted those numbers because of your must-carry amendment that you are speaking of.

Mr. EVERETT. I can get you those numbers.

Senator INOUYE. Mr. Sodolski, how much would it cost to build a broad-band telephone network?

Mr. SODOLSKI. How much would it cost to build a broad- band telephone network?

Senator INOUYE. I ask that question because we have been told that the cost is so exorbitant it will take a long time before it becomes a reality.

Mr. SODOLSKI. I am hesitating, because I am not sure which end to start at.

We already spend in the neighborhood—the industry—of about $20 billion a year for investment in plant. As fiber has become competitive with copper, we will be deploying fiber, and—within what we already spend will be deploying some fiber, so those who say it is going to cost X hundreds of billions of dollars to build a broad-band network are overstating the case.

I might add parenthetically, I notice with some interest that when Times-Warner said they are going to deploy fiber in Long Island, I believe it was, they estimated $100.

If you want my best estimate, depending on when we start—when we start—if you were to say to us, today you can start right now to deploy a fiber broad-band network and we will repeal the cross-ownership restriction, it would probably cost us an additional $100 billion over a period of a decade. That is, in addition to the $20 billion we are already spending.

Senator INOUYE. Is it true that at the present time fiber optic would cost about $4,000 per subscriber?

Mr. SODOLSKI. No, sir. There are so many variables here. Fiber to the curb, fiber to the residence, the nature of the electronics on the house, where it is located—that is, where the installation is located, but $4,000 is way beyond the highest estimate I have had from our industry.

Senator INOUYE. Mr. Kimmelman, how would you bring about your suggestion that we call for competing applications?

Mr. KIMMELMAN. Well, we have a few examples, as I cited, of communities that have two cable systems. I listened with great interest this afternoon to the mayor's, and was a little curious as to whether there were not greater opportunities for having competing systems. Apparently, there have not been that many offers in most communities, and that appears to be the problem.

I think the best route we have is the provision in this legislation—S. 12—that would free up programming that is cable-owned, and make it available to other technologies. We have at least the wireless technology and satellite technologies that are out there, up and going, and that just need the programming to come in and compete.

I think we heard that the cities seem to be quite open to having multiple systems—at least, that was my impression of their position—so if that programming were available to others who are in a position, today, to enter the business, I would hope we would have an opportunity for greater competition. That, by itself, would alleviate much of the need for regulation that we now have because of monopoly local franchising.

Senator INOUYE. Thank you.

Senator Packwood?

Senator PACKWOOD. Gene, we will be on the same side of most things, and you are a whale of a lobbyist, and I appreciate you candor.

Why is not—I was thinking of Owensboro. The license is up this year. Why is not that just a hell of a hammer on the cable company? If they do not grant the license, all the wires stay there. The cable company is out, and you put it out for a new bid.

Mr. KIMMELMAN. Senator Packwood, we always thought it was a great hammer, and this was even before the 1984 act, and you will recall cable systems were promising 60, 80, 100 channels, so the promises were made. What you find is, once you get the franchise, once you get it renewed, the promises disappear. It is not economically feasible. It is somewhat of a peculiar bargaining situation that does not follow normal marketplace signals.

Senator PACKWOOD. But would it not, in Owensboro—here is a town of 24,000 subscribers. You can make money very well on that. Here is a system in place, that the company does not get to take if it does not get the franchise, and I think maybe the cities have gotten smarter.

When we had this first round of franchises, there were a lot of fast-buck operators in this business—or maybe there were not. Maybe they thought they could deliver 80 or 100 channels for $5 a channel.

But why is Owensboro not in a great position now to go out to half-a-dozen cable companies in this country and say, we have got a system already in place. The franchise is up. Who would like to bid? What would you like to give us?

Mr. KIMMELMAN. I think the problem is—I think Senator Gore reflected on this—you could find a service problem from that system in Owensboro, but it is not for the entire duration of the franchise. The law is a little vague in that area. So the city does have a weak foundation to leverage on that point. The cable company can go into court and challenge them—for a lot of good reasons.

Once a cable company has made the investment, has put down that fixed-cost investment, has the system out there, they do not want to have to throw it away, give it away for nothing, so there were some good reasons for some cable operator protection in the 1984 law, although I think it is slanted a little too much towards the cable operator. So I think the cities are at a disadvantage.

Now, New York City could challenge its cable operator. They probably can finance a lawsuit or the bargaining that would go on. I think most cities cannot. The second factor that is important to remember is that some of these even small community cable companies are affiliates of giants. They are affiliates of a TCI or a Time-Warner that can bankroll litigation, and we hope to avoid that.

I think if we look back at those franchising provisions in the 1984 law, some playing on the margin with them would even up the bargaining a little bit, but I do think—as long as we are talking 20-year, long-term franchises, we are always going to have that problem of overpromising and then not delivering because of economic feasibility.

Senator PACKWOOD. Although—and I will conclude with this—Owensboro might be in a situation now to say, we are only going to give you a 5-year franchise because the equipment is already in place. Now, if you want to come in on that, and we will see how you do for 5 years——

Mr. KIMMELMAN. I think you are absolutely right, Senator.

Senator PACKWOOD. But you have to be at the end of a franchise with an in-place system to have that situation.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you. Gentlemen, thank you very much.

Our final panel consists of the president of the Wireless Cable Association, Mr. Robert L. Schmidt, and the chief executive officer of the National Rural Telecommunication Cooperative, Mr. Bob Phillips.

The president of the Satellite Broadcasting & Communications Association, Mr. Charles Hewitt, had planned to be here but he had to leave because of an unexpected problem. His statement will be made part of the record.

I thank you both for waiting this long. May I call on Mr. Schmidt?

STATEMENT OF ROBERT L. SCHMIDT, PRESIDENT, WIRELESS CABLE ASSN

Mr. SCHMIDT. Mr. Chairman, my name is Robert L. Schmidt. I am the president of the Wireless Cable Association, and first of all I would thank you for the opportunity to testify today.

We have participated in previous hearings before the Senate on the subject of cable monopoly. We believe that the bill that is before this committee—S. 12—is an excellent vehicle to facilitate what we think is the issue here, and that is to promote competition.

Somehow along the way I think the bill has been miscast as a reregulation bill, and I am not saying there are not portions of it that would fit that description. I think the point is that competition is really the solution to this problem in the marketplace.

I want to make three points in my remarks before this body today. We think that just your presence over the last 2 years has made a significant difference in the marketplace. We now have 70 systems up and under construction in 1991. We have 300,000 subscribers. We have the programming, with the exception of TNT and the regional sports. That is the good news.

The bad news is that the terms—price, terms and conditions we have for that product in many cases are quite onerous. I refer to our status as being tenants at sufferance.

We find that our programming friends say, trust us, we are going to give you the product. We will work out longer-term arrangements with you soon, but in the meantime we are going to furnish you the product so you can get on with your business.

In some instances we are paying 200 percent more. In the case of CNN, we pay about 36, 37 percent more than a cable operator does for the same service.

One of the things that has again come out in our experience in the last few years, which I think is quite interesting, as we look at the whole subject of education in this country, because of the nature of our technology we lease up to

20 channels of instructional television fixed service, ITFS channels, and when we do that we invest capital.

Now, here is a good insight. In the brief time we have been in business since programming has been made available to us, we have already invested $20 million in capital equipment for various educational institutions. We pay these educational partners of ours today, within that small framework of companies, $2 million annually, and more importantly we are going to give them something that they have long needed, and that is a reach out of the schoolhouse into the home.

Because of the nature of our technology, it is addressable scrambled, so that we can provide for many communities, now, educational programming into the home that previously was unaffordable. The teachers would be out of range of their budgets. So that now, again, we have a partnership. So this is not a public relations program, this is a partnership.

We havē been very fortunate. As I say, in the brief 2 years since programming has started to become available to us, I think we have provided an excellent choice in the marketplace.

I cite Corpus Christi, TX, as an example. The average consumer in Corpus Christi today who had cable now have their phone calls answered by the cable company. The local cable companies are more response and in some cases provide service in a matter of 48 hours. That was not the case before.

We are competing there. We have built a very competitive service. Prices have been to the customer's advantage. They have not had a rate increase in Corpus Christi in the last year or so. Again, I think the point it, competition is really the solution.

I found last year when I testified here there was a tremendous focus on the sort of mega opportunity that DBS was going to bring with sky cable. The facts are, the consumers that are taking our service are happy. Very seldom—after we take a consumer and provide their service, that we are now doing with 33 channels, they are not going back to cable because they are being treated fairly, the quality of the picture is excellent, and there are very few outages when the service encounters weather, as cable does.

So all in all I think that the premise of competition is real, and I think we can provide that. I think S. 12 is extremely important. I think last year's legislative effort was a very valid one on many of your parts, including yourself, but I think the new bill is really better for consumers.

With fair access to programming, competitors like ourselves can come into the market, and I believe that, contrary to my colleagues in the cable industry, I think there is interest in this Congress to see this legislation passed and I think it is a real, bona fide consumer issue.

Thank you very much.

[The statement and questions and answers follow:]

TESTIMONY OF

ROBERT L. SCHMIDT

PRESIDENT, WIRELESS CABLE ASSOCIATION

INTRODUCTION

Mr. Chairman and Members of the Subcommittee, on behalf of the Wireless Cable Association,[1/] I thank you for the opportunity to participate in this hearing on S. 12, the "Cable Television Consumer Protection Act of 1991." The early introduction of this important legislation, and the Subcommittee's decision to conduct today's hearing at a time when there are such obvious other issues of national importance commanding your attention, demonstrate that policy issues surrounding the subscription television marketplace will be a priority consumer issue in this Congress.

For some time now the Subcommittee has built a voluminous record documenting the need for it to revisit the Cable Act of 1984 in legislation such as S. 12. There are alarming new trends since the Subcommittee last convened on this subject which make the case for S. 12 even more compelling: the resurgence of cable price increases and retiering, the domination

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1/ The Wireless Cable Association is a trade association of firms and individuals who are involved in the distribution of satellite-delivered programming to the public through wireless cable systems. Simply stated, wireless cable uses over-the-air frequencies rather than coaxial cable lines to deliver program services to subscribers. Although design varies from operator to operator, the typical wireless cable system receives its satellite-delivered programming using earth stations located at the system headend. The wireless cable system then retransmits that programming in scrambled form to small rooftop antenna systems via up to 33 video channels assigned and regulated by the FCC. At each subscriber's premises, the wireless cable programming and all locally available broadcast television signals are fed over coaxial cable to a set-top decoder/channel selector box, through which the subscriber can tune to any available channel.

of DBS by the K-Prime MSO Partners, and most recently, the proposals to move NFL games to Pay Per View.

In my testimony today I hope to accomplish three objectives:

- First, report to you on the improving state of the Wireless Cable industry, which is demonstrating what it can offer to consumers by way of a competitive alternative -- and to education through its ITFS licenses -- if only it is given a chance.
- Second, explain why legislation providing competitors fair access to programming is more essential than ever before to enable Wireless Cable to achieve its full potential as a competitor and as a partner with local educational institutions.
- Third, convey our strong support for S. 12 and explain why we believe its access to programming provisions are even more sensible and workable than those of its predecessor, S. 1880, which Wireless Cable also endorsed.

STATE OF THE INDUSTRY

I can report that the Wireless Cable industry is alive and continuing to grow, slowly but steadily, despite significant obstacles. The last time I testified before the Subcommittee there were Wireless Cable operations in 45 different communities;

there are now over 70 systems in place or under construction.[2] We expect the pace of the industry's growth to increase steadily in the coming months.

We have been appearing before you now for over three years to discuss the factors that limit our ability to compete with the established coaxial cable industry. Your concern and the record you have built over this time are paying off, even though legislation has fallen short of enactment. Clearly, the cable industry has been challenged on a bipartisan basis with many anti-monopoly, pro-consumer legislative proposals on both the state and national levels, not to mention extensive inquiries by the FCC. The net result is a much more positive attitude on the part of most programmers to make programming available to Wireless Cable distributors.

Access to Programming Improved

Based on the information that we are receiving from our operators, with the exception of TNT and many key regional sports programmers, satellite television programmers are dealing with the Wireless Cable operators -- but in many cases at exorbitant prices and on onerous terms, and only after a lengthy and exhaustive courtship. Still, we are happy to be doing business and will be working diligently to negotiate contracts with fair and equitable prices and terms.

2/ A map showing major Wireless Cable systems is Attachment 1.

We think that the key to the emergence of Wireless Cable systems is the availability of product, i.e., the availability of satellite delivered video programming to Wireless Cable distributors. Without an adequate array of fairly-priced programming, there is no business. As our limited but I believe significant experience shows, when Wireless Cable systems are able to provide customers with a full complement of programming, we can succeed in the marketplace and provide real competition, offering consumers lower prices and a quality choice.

- **Sacramento's PacWest**, for instance, competes head-to-head with a cable system, to date gaining nearly 10% of the market. Half of PacWest subscribers are former cable customers who turned to the Wireless Cable alternative for its superior service and competitive prices.
- **ACS Enterprises**, Philadelphia's Wireless Cable system, is also making steady inroads in its market.
- **OmniVision** in Corpus Christi, with 31 channels, is an attractive alternative to the 35-channel cable system that previously enjoyed a monopoly in the area. In addition, OmniVision is bringing satellite-delivered programming to many Corpus Christi residents whose homes were not previously passed by cable.
- **Capital Wireless** is also giving cable a run for its money in the Albany area. Capital Wireless prices its 27-channel system competitively with the 29 channels available from the cable competitor.

Interest in the Industry is High

These success stories have boosted interest in Wireless Cable and attracted many newcomers to the industry. We had a very successful convention in Denver last July, with significant representation by the financial community and our greatest attendance ever. We anticipate a bigger success this year when we return to Denver this coming July 21-22. Recent Wireless Cable seminars in Atlanta, Anaheim, New York, and Washington, D.C. were well received by the financial community, as well as individual investors and companies wanting to learn how to get into the business.

FCC Rulemaking Supports Industry

The industry also had a successful year at the FCC. Although the agency did not go as far as the Wireless Cable Association advocated, the FCC did recommend that Congress enact legislation to assure Wireless Cable fair access to programming. At the WCA's urging, the Commission also commenced a major rulemaking in February designed to simplify the regulatory environment in which we operate. The FCC's October 11 order in this proceeding made significant improvements in the licensing process, and further benefits are expected as the Commission issues additional orders during 1991. Finally, late in 1990, the Commission ruled that Wireless Cable systems are not required to secure local franchises under the 1984 Cable Act.

Wireless Cable's Educational Partnership Strengthened

Wireless Cable is also beginning to fulfill the role envisioned for it when it was created by the FCC: making a major contribution in the field of education. The FCC, by permitting Instructional Television Fixed Service ("ITFS") excess capacity to be made available to Wireless Cable, made educational programming an integral part of our business. Up to 20 ITFS channels may be leased from educational institutions to Wireless Cable operators, but an ITFS channel is only available for commercial use if it is used for a minimum of 20 hours a week for educational programming. Revenues from the Wireless Cable lease support the ITFS licensee's educational programming. As a result of this partnership, up to 400 hours of educational programming can be transmitted each week to homes and communities which educators previously had not been able to reach. Wireless Cable can thus be the solution to the need of communities with small or disadvantaged student populations to offer math, science, language equivalence, and other advanced or specialized courses which otherwise would be economically impossible to provide in a traditional classroom setting.

Wireless Cable is already paying over $2 million annually in fees to its ITFS licenses, and that contribution may be expected to increase as more systems become operational. In addition, Wireless Cable systems have to date invested over $20 million to provide equipment and facilities used to transmit educational programming beyond the classroom into the community. And, because the Wireless Cable signal is "addressable," local educators have the option of charging tuition to student subscribers, thereby providing an additional revenue stream.

In sum, the further expansion of the young Wireless Cable industry will be a boon for our ITFS partners, including, for example, the following institutions:

University of Arizona
Brown University
University of California
California State University
Columbia State College (Tennessee)
Cumberland University (Tennessee)
George Mason University
Greenville Technical College (South Carolina)
El Paso Community College
New Orleans Educational Consortium
St. Bernard Parish School Board (New Orleans)
Oregon Commission on Public Education
Jefferson County Board of Education (Louisville, KY)

as well as other public and religious school systems across the country.

S. 12 IS NEEDED MORE THAN EVER

The Wireless Cable industry has indeed experienced a very good year. As I have indicated, through the concern of the Subcommittee and many other Members of Congress, we are beginning to enjoy an atmosphere in the marketplace where it is possible to do business. In short, we are growing stronger, but our condition is still precarious. We are willing to take up the challenge to prove ourselves in the market, but without S. 12 becoming law we may never have a chance.

There are at least four reasons why the fair access to programming provisions in S. 12 are essential:

- First, while we have made progress in obtaining programming contracts, the question remains, do we merely have what I have been calling a "tenancy at sufferance?" We have not yet institutionalized our ability to get the programming that we have been picking up over the last twelve to eighteen months. We want to make sure that we will continue to be able to obtain programming, and that nobody, for example, takes the death of S. 1880 last year as a sign that they can return to the anti-competitive practices of previous years.

- Second, sports. We have great difficulty in obtaining the right to carry sports programming, putting us at a severe competitive disadvantage. If you have any doubt about how important sports programming is in selling your service to subscribers, just look at the way cable is marketed. Sports is increasingly being marketed, quite rightly and intelligently, as the basis for opting to subscribe to cable. You might recall the testimony and exhibits last year about the billboard in Los Angeles: "No Cable, no Gretskey; No Cable, no Magic."

Simply put, if we are serious about being competitors, we need sports programming. And without S. 12, we fear we will not get it. Despite all our efforts, TNT is not available, and much important regional sports programming, especially those regional sports services owned by TCI, are unavailable.

- Third, price, terms and conditions. Increasingly, we hear reports that even when a Wireless Cable operator is able to obtain programming it is at an unfair or discriminatory price. Members of the Subcommittee are very familiar with this phenomenon -- it is not a problem unique to Wireless Cable. You will for example, recall the vivid testimony of Bob Phillips of the NRTC last year documenting charges as much as 444 percent higher than those paid by cable systems for the same programming.

In addition, Wireless Cable operators often experience "red-lining"; that is, the Wireless Cable operator is restricted from carrying programming in areas where there is already a cable operator. The contracts go so far as to list zip codes where the wireless operator is and is not authorized to distribute programming. The black-out areas are those where a coaxial cable company has the local monopoly.

__Fourth__, it is still too hard and too time consuming for our start-up business to get the programming. Last year, Matt Oristano, Chairman, People's Choice TV Partners, testified before the House Telecommunications Subcommittee and addressed this point.[1] Mr. Oristano vividly described how, when he was in the cable business, all he needed to do to get programming was to pick up the telephone and ask. That is not the case now that Matt has become a Wireless Cable operator. Now he is obliged to provide reams of financial and other data; it can take years before a deal is completed. Obviously, the gauntlet Wireless Cable operators are forced to run not only delays their ability to deliver programming to consumers, but can be fatal to their

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1/ Mr. Oristano's testimony is Attachment 2.

business as needed financing is often expressly conditioned on holding contracts for certain key programming.[4]

Perhaps the most compelling reason why S. 12 is needed is that cable will not voluntarily clean up its act. Cable's commitment to price restraints, customer service and meeting its obligations to the community and its educators will only improve if there are more competitors.

As far as rates go, it appears that cable can't help itself. Consumer prices for cable television service in 1990 hit their highest levels since the U.S. Labor Department began monitoring them in 1984. For the last calendar year, cable prices rose 13.1 percent, while prices for all goods and services tracked by the agency increased 6.1 percent during the same period.[5]

There are several other developments which I would call to the Committee's attention which may bear close scrutiny. These include:

- Retiering practices that operate as hidden rate increases.[6]
- The K-Prime MSO Partners' Primestar DBS venture, in which nine of the largest cable MSO's are

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[4] *See* Attachment 3.

[5] Aversa, "Cable Prices Soared Despite Regulation Fight," *Multichannel News*, Jan. 21, 1991, at 24 (Attachment 4).

[6] Haugsted, "A Tale of Retiering," *Multichannel News*, Jan. 21, 1991, at 1 (Attachment 5).

assuring that the only existing commercially viable DBS business will not compete with cable.

-- The recently announced proposals to carry NFL games on a Pay Per View basis.

Upon examining these recent developments, we believe that you will find new reasons justifying legislation.

For these reasons, we need your help. Self help through private antitrust litigation is an imperfect and, under current law, an uncertain remedy for us. At best it is extremely costly and time consuming. On a case-by-case basis, when adequately funded Wireless Cable operators have pursued this route, they have sometimes succeeded. For an entire industry to rise or fall on private legal actions, however, is not much in the way of rational public policy, especially when there is an immediate need for increased competition in the marketplace.

Some would say that the relief S. 12 offers to competitors, not mandated access but a fair right for qualified businesses to contract and pay for programming, is unnecessary and that newcomers such as Wireless Cable should be developing their own programming.7/ Well I will say flat out, that

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7/ Cable achieved its position of dominance with a big helping hand from Congress in the form of first, the compulsory license, and second, the 1984 Act's rate deregulations. Cable often attempts to justify its monopoly status by claiming that it took a risk and created the programming which is now being denied to Wireless Cable among others. Wireless Cable and other potential new entrants into the marketplace, Cable asserts, should take their own risks and create their own programming.

(continued...)

position is completely unrealistic. The programming that we sought for years to obtain the rights to carry is not only terrific -- that is why we want to offer it to customers -- it is unique. Particularly, this programming is very difficult to create, or replicate on our own. For example, just imagine if you were to attempt from scratch to create a programming service as fine as HBO or Showtime. I believe you would have to appreciate just how difficult that effort would be. Besides, where do you get the movies at this point? And think about sports programming, it would be very difficult for the Wireless Cable industry to start an ESPN or a TNT or a regional sports program. In fact, that name brand, professional and collegiate

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7/(...continued)
However, the cable industry's collective memory is evidently very short. The members of the Subcommittee must surely recall the early to mid-seventies, and cable's battle with broadcasters over the compulsory license. At that time, it was cable that argued that access to programming at reasonable rates was necessary to enable the fledgling industry to compete. Cable prevailed in its argument and was granted a compulsory license which allowed it to carry certain broadcast programming for a very low rate. It was this advantage more than anything else that enabled cable to quickly consolidate its position in local markets and reap substantial profits. And these monopoly profits have in turn enabled the cable industry to buy existing programming services.

This is not risk-taking. Cable would not be in the position it enjoys today had it not been for the benefits it received early on from its compulsory license. Neither Wireless Cable, nor any other potential alternative distributor, could today create its own programming in any realistic way.

league kind of coverage is what people want to see, and so it is very, very important.

Now we are not asking you to re-regulate the Cable industry. But the truth is that without competition, no efforts to moderate prices or to protect consumers will succeed. All we seek is for a legislative jump-start to give competition a chance in the market, and we believe that S. 12 can afford us that chance.

S. 12 OFFERS A SENSIBLE, WORKABLE APPROACH TO THE NEED FOR FAIR ACCESS TO PROGRAMMING

From our perspective, the most important cable oversight issue for the Subcommittee is how to eliminate the discriminatory practices which prevent Wireless Cable or any other alternative distributor from obtaining the programming needed to attract consumers.

Many bills have been introduced in the Senate which address this problem in slightly different ways.[8/] In each bill a potential competitor who complains of being unfairly denied programming would have some recourse, either in court or most typically at the FCC. The provisions would enable a complaining party to at least have a neutral third party objectively

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8/ In the 101st Congress these included S. 168, S. 833, S. 834, S. 905, S. 1068, and S. 1880: and in the 102d Congress they include S. 12, S. 211 and S. 431.

adjudicate its claim, with penalties imposed if the complaint is frivolous.

Now this kind of provision was targeted as the primary defect in last year's Senate bill, at least by the cable industry -- one that was to be opposed at all costs. I guess that speaks volumes about how important the access provisions are to fostering meaningful competition with cable.

In the final days of the 101st Congress, perhaps in part to respond to cable's concern, and in an effort to move legislation and secure certainty in the marketplace, a compromise proposal was floated by Senator Gore and Senator Wirth. The Wireless Cable Association had deep reservations about the proposal.

First, the so-called compromise did not apply to sports. Sports programming was systematically excluded by a combination of several different loopholes. As you know, all of the various access to programming provisions have been applicable only to affiliated programmers -- programmers who are affiliated with cable-MSOs. So, in effect, ESPN was never covered.

The so-called compromise proposal also contained a grandfather clause, and it exempted from coverage of the bill any programmer who had entered into exclusive contracts on or before June 1, 1990, or any renewal or extension of those contracts. I am told that this grandfather cause was inserted at the request of TNT, and, though I don't fully comprehend how, that at least

TNT believes that the language would have exempted TNT from coverage of the access to programming provision.

Nor would the proposed compromise language have applied to regional sports programming, even though regional sports were covered in last year's House bill. So, in sum, there was no ESPN, no TNT and no regional sports in the last proposal floated in the Senate before the close of the 101st Congress.

Another problem with the so-called compromise was that the remedy provided in that proposal was too uncertain and potentially too time-consuming and difficult to litigate to be much reassurance. To their credit, even though it was against their interest, our lawyers predicted that if the bill had been enacted in that form, it would have been certain to initiate a costly lawyers' game. Much less certain would have been the relief actually afforded to individuals in the Wireless Cable, Private Cable, DBS, and TVRO industries who wanted to make use of the fair access provisions.

For example, the proposal stated that it was "unreasonable" to refuse to deal with a potential competitor. However, there was no explicit language that made it obvious that price discrimination was covered. An able lawyer could argue that of course, at some point, a high price amounts to a de facto refusal to deal. But unfortunately that is an argument that needs to be made, and which might well be rebutted. It is not at all clear, for reasons I will explain later, that we would have prevailed with such an argument because the language is, at least on the price discrimination point, ambiguous at best.

Moreover, it would not have been an unreasonable refusal to deal, under the proposed compromise, if the basis for the refusal to deal was an exclusive contract which did not "significantly impede competition." What does that mean? I won't go into the very specific details of the definitions of "significant," but my concerns and those of others were that the specific examples of what significantly impedes competition did not cover what is going to be the most typical situation. They do not cover the Wireless Cable system operator in one market who cannot get one type of programming. The burden was on the party seeking relief to show that the problem was a pattern of exclusive contracts across the country, or that within the one market it was part of a pattern of several exclusive contracts. So even for the programming which was covered within the proposed compromise, it was not at all evident that, even if you had a good case, hired the ablest lawyer in town and spent a lot of money, you could succeed.

Another feature of the proposal that reduced the chances of ultimate success was the separate treatment accorded the TVRO home dish industry. TVRO owners were given their own extremely strong programming access rights. So when a Wireless Cable or a Private Cable operator said, "Look, we have the right to programming," the side defending could say "No." They could say that when Congress wanted to give a clear right to programming it knew how to do so, and that it did it for the home dish industry and no one else; Congress did not mean to give Wireless Cable that clear cut right of access.

These are some of the reasons why we had great concerns about the language that was floated in the last days of Congress. We were greatly reassured, therefore, when Senator Gore stated:

> If we are unable to pass legislation in that regard I do not consider the [Gore-Wirth compromise] to be the last word on programming access or any kind of starting point for program access next for a bill next year.[9]

I also read with relief Senator Danforth's statement:

> Next year's bill will not be tougher to punish the industry. No, it will be tougher because the committee leadership has learned that there is nothing to be gained by negotiating with the cable industry. This year, we compromised. A number of Senators made compromises in an attempt to move legislation quickly at the end of this Congress. But next year, we will have the luxury of time. And in my view, next year we will have time to do it right.[10]

Well, you meant what you said, because we are starting off with a better bill, S. 12.

Section 2 of S. 12 itemizes the facts that justify removing the obstacles to alternative multichannel distributors' ability to enter the marketplace and compete with cable:

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[9] 136 Cong. Rec. S 15105 (daily ed. Oct. 12, 1990)(Statement of Sen. Gore).

[10] 136 Cong. Rec. S 18071 (daily ed. Oct 24, 1990)(Statement of Sen. Danforth).

> 1. Most cable television subscribers have no opportunity to select between competing cable systems. Without a sufficient number of local television broadcast signals and without the presence of another multichannel video programming distributor, a cable system faces no local competition.
>
> 2. There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.
>
> 3. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over non-affiliated cable operators and programming distributors using other technologies.

According to S. 12, it is the policy of the Congress, among other things, to:

> 1. Promote the availability to the public of a diversity of views and information through cable and other video distributor mechanisms.
>
> 2. Rely on the marketplace, to the extent feasible, to achieve that availability.

These policy statements are worth underscoring. They demonstrate that the intent of S. 12 is not to re-regulate the cable industry, and its opponents would err were they to describe it in that fashion. Rather, the intended approach is obviously to stimulate competition and thereby minimize the need for government intrusion into the marketplace.

Section 5 of S. 12 would revise the effective competition standard. Recognizing that downward pressure on prices can only be generated by the presence of a multichannel competitor, the bill would establish a test which has been advanced by the Wireless Cable Association before the FCC in its effective competition rulemaking:

> Effective competition exists when a cable community is served by a sufficient number of local television broadcast signals and by more than one multichannel video programming distributor.

Under S. 12, there is more than one multichannel distributor if an unaffiliated competitor is available to more than 50 percent of the households and has 15 percent of the subscribers in a cable community. We also believe that the exception to this rule, for cable communities with fewer than 30 percent of the households in the cable community, is a sensible measure to avoid disincentives to wiring a yet unwired area or otherwise extending cable services into new communities.

The most critical part of the bill for the Wireless Cable industry is Section 6, which prohibits discriminatory practices in the offer or sale of video programming. In contrast to earlier proposals, we believe that S. 12 takes a clear, straightforward approach to the problem.

First, the bill does not discriminate among delivery mechanisms: S. 12 is technology neutral. The same rules and standards would apply to Wireless Cable, Private Cable, DBS, TVRO, cable distributors, and any future programming distributors.

Second, Section 6 of the bill not only prohibits unreasonable refusals to deal, but also explicitly prohibits discriminatory price, terms or conditions, if such action impedes retail competition. As I mentioned earlier, this latter provision will be very important given the situation most Wireless Cable operators now face in the market.

With the exception of ESPN, which as the Subcommittee knows is a non-affiliated programmer and therefore not subject to Sec. 6 of S. 12, the bill's access to programming provisions would apply to sports -- including the vitally important TNT and regional sports programming.[11/] In real world terms, no other aspect of the bill may be so critical to the ability of Wireless Cable to compete with cable in the marketplace.

Now those who charge that Section 6 is outrageous or a major intrusion haven't read or are just ignoring the language of this bill. All that it prohibits are unreasonable refusals to deal, and discriminatory prices, terms, and conditions. The bill states expressly that a video programmer may:

> (1) impose reasonable requirements for creditworthiness, offering of service, and financial stability;
>
> (2) establish different price, terms, and conditions to take into account differences in cost in the creation, sale, delivery, or transmission of video programming;

[11/] S. 12 defines "regional" in a manner that would ensure that the most desired area sports programming is available to subscribers of alternative distribution services. S. 1880 did not include regional sports programming within its access provisions.

> (3) establish price, terms, and conditions which take into account economies of scale or other cost savings reasonably attributable to the number of subscribers served by the distributor; and
>
> (4) permit price differentials which are made in good faith to meet the equally low price of a competitor.

Rather than stimulating a costly lawyers' game over ambiguous standards and defenses, S. 12 calls for the FCC to "provide for an expedited review of any complaints" and quite correctly provides for penalties to be assessed against any person filing a "frivolous complaint." S. 12, § 6(d)(1)-(2).

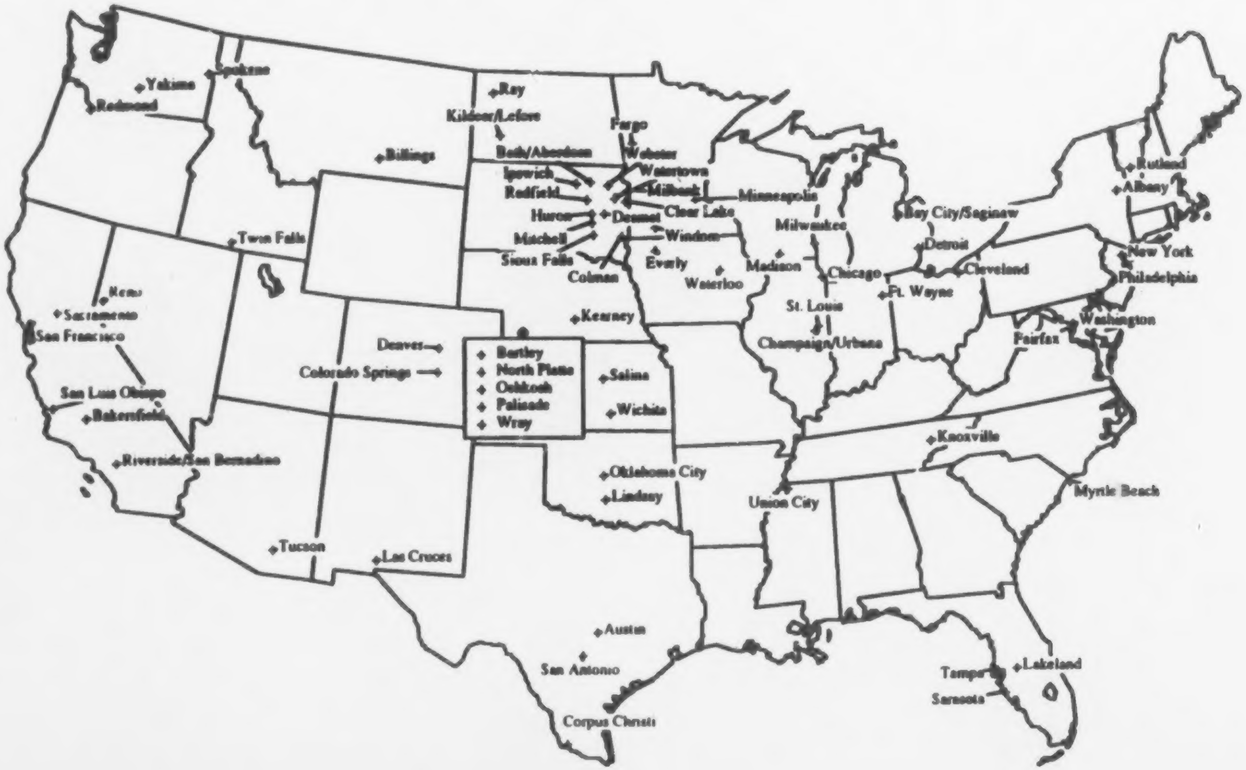
Finally, in a big advance over earlier bills, S. 12 closes the exclusivity loophole. No presumptions are created in section 6; deals have to rise or fall on their own merits. Exclusive agreements will be permitted, as long as they are reasonable and non-discriminatory, but the bill, unlike last year's, does not cloak such arrangements with an air of legitimacy.

* * *

Again, the Wireless Cable Association applauds the hard work of the sponsors of S. 12 and this Subcommittee to address equitably the problems facing those who wish to compete with cable. We believe S. 12 represents a fair and reasonable solution to the need to stimulate more competition in the delivery of subscription television. The Wireless Cable industry, and its ITFS partners in local education, look forward to working with Congress to ensure passage of this important legislation.

US Wireless Cable Operations, 2/91

(Operating Systems or Under Construction in 1991)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Fargo
Webster
Watertown
Milbank
Clear Lake
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Champaign/Urbana
Bay City/Saginaw
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Fairfax
Knoxville
Myrtle Beach
Union City
Twin Falls
Reno
Sacramento
San Francisco
San Luis Obispo
Bakersfield
Riverside/San Bernadino
Tucson
Las Cruces
Denver
Colorado Springs
Bartley
North Platte
Oshkosh
Palisade
Wray
Kearney
Salina
Wichita
Oklahoma City
Lindsay
Austin
San Antonio
Corpus Christi
Tampa
Sarasota
Lakeland

QUESTIONS OF SENATOR GORE AND THE ANSWERS THERETO

1. The Wireless Cable Association asserts that it is has difficulty in obtaining fair access to programming at reasonable price, terms and conditions. In other words, it appears to be a victim of discrimination. Can you provide some examples of these discriminatory actions?

All too frequently, when a Wireless Cable operator is able to obtain programming it is at an unfair or discriminatory price. Members of the Subcommittee are very familiar with this phenomenon — it is not a problem unique to Wireless Cable. You will for example, recall the vivid testimony of Bob Phillips of the NRTC last year documenting charges as much as 444 percent higher than those paid by cable systems for the same programming.

In addition, Wireless Cable operators often experience "red- lining"; that is, the Wireless Cable operator is restricted from carrying programming in areas where there is already a cable operator. The contracts go so far as to list zip codes where the wireless operator is and is not authorized to distribute programming. The black-out areas are those where a coaxial cable company has the local monopoly.

2. Cable claims that they have invested an enormous amount of time and money to create new programming. Why should the cable industry provide these programs to other alternative multichannel distributors? Why can't the non-cable systems create their own programming?

Cable achieved its position of dominance with a big helping hand from Congress in the form of first, the compulsory license, and second, the 1984 Act's rate deregulation. Cable often attempts to justify its monopoly status by claiming that it took a risk and created the programming which is now being denied to Wireless Cable among others. Wireless Cable and other potential new entrants into the marketplace, Cable asserts, should take their own risks and create their own programming.

However, the cable industry's collective memory is evidently very short. The members of the Subcommittee must surely recall the early to mid-seventies, and cable's battle with broadcasters over the compulsory license. At that time, it was cable that argued that access to programming at reasonable rates was necessary to enable the fledgling industry to compete. Cable prevailed in its argument and was granted a compulsory license which allowed it to carry certain broadcast programming for a very low rate. It was this advantage more than anything else that enabled cable to quickly consolidate its position in local markets and reap substantial profits. And these monopoly profits have in turn enabled the cable industry to buy existing programming services.

This is not risk-taking. Cable would not be in the position it enjoys today had it not been for the benefits it received early on from its compulsory license. Neither Wireless Cable, nor any other potential alternative distributor, could today create its own programming in any realistic way.

The recent demise of Starion and FNN, which both had impressive financial backing, demonstrates why it is not feasible for a start-up industry to create its version of the most popular name-brand programming. The programming that we sought for years to obtain the rights to carry is terrific and it's unique, and practically, it is very difficult to duplicate or create or replicate on our own. For example, just imagine if the Wireless Cable industry were to attempt from scratch to create a programming service as fine as HBO or Showtime. I think the Subcommittee would have to realize how difficult that would be. Besides, where would we get the movies at this point? And think about sports programming. It would be very difficult for the Wireless Cable industry to start an ESPN or a TNT or a regional sports program, and in fact that name-brand, professional league kind of coverage is what people want to see. So it is very, very important that all competitors have access to that programming.

There are some areas where we can create programming. Wireless Cable, through its instructional television fixed service spectrum, has the ability to convey and to project, to a much greater extent than was previously accomplished, educational programming throughout local communities. So that is one area where we can provide a new service and we can assist in the expansion of unique educational programming in the community. Our ability to generate that kind of educational programming is dependent on our presence in the market, which in turn hinges on fair access to name-brand programming.

3. Why is access to regional sports programming such an important part of the proposed legislation?

Wireless Cable has great difficulty in obtaining the right to carry sports programming, putting us at a severe competitive disadvantage. If you have any doubt about how important sports programming is in selling your service to subscribers, just look at the way cable is marketed. Sports is increasingly being marketed, quite rightly and intelligently, as the basis for opting to subscribe to cable. You might recall the testimony and exhibits last year about the billboard in Los Angeles: "No Cable, no Gretzkey; No Cable, no Magic."

Simply put, if we are serious about being competitors, we need sports programming. And without S. 12, we fear we will not get it. Despite all our efforts, TNT is not available, and much important regional sports programming, especially those regional sports services owned by TCI, are unavailable.

4. flow critical is the access to programming section, as well as the proposed legislation as a whole, to the success or failure of your industry?

While the Wireless Cable industry is growing stronger, our condition is still precarious. We are willing to prove ourselves in the market, but without S. 12 we may never make it:

First, while we have made progress in obtaining programming contracts, the question remains, do we merely have what I have been calling a "tenancy at sufferance?" We have not yet institutionalized our ability to get the programming that we have been picking up over the last twelve to eighteen months. We want to make sure that we will continue to be able to obtain programming, and that nobody, for example, takes the death of S. 1880 last year as a sign that they can return to the anticompetitive practices of previous years.

Second, as discussed above, sports are our lifeblood. Cable realizes this and wants to limit our access. Without S. 12, we may never be able to obtain rights to carry the sports programming so important to subscribers.

Third, as also mentioned earlier, we are still charged excessive prices and subjected to discriminatory terms and conditions. S. 12 would put a stop to this practice.

Fourth, it is still too hard and too time consuming for our start-up business to get the programming. Last year, Matt Oristano, Chairman, People's Choice TV Partners, testified before the House Telecommunications Subcommittee and addressed this point. Mr. Oristano vividly described how, when he was in the cable business, all he needed to do to get programming was to pick up the telephone and ask. That is not the case now that Matt has become a Wireless Cable operator. Now he is obliged to provide reams of financial and other data; it can take years before a deal is completed. Obviously, the gauntlet Wireless Cable operators are forced to run not only delays their ability to deliver programming to consumers, but can be fatal to their holding contracts for certain key programming.

5. Why isn't your remedy in court? I understand that recently Wireless Cable operators have not been successful with antitrust claims against programmers and MSOs. Why should we legislate what courts are unwilling to do? Put another way, some Wireless Cable operators have been successful in court, why is legislation needed where a solution could be achieved in court?

We believe we do have a remedy in court. In individual cases, with good facts and adequate funding, it is possible to successfully pursue antitrust claims. We have wireless cable systems and operators, when they are able, pursuing litigation. That option is always there.

The important question to ask is: if existing antitrust laws are adequate to attack anti-competitive behavior, then why do we need legislation? The answer is, that, if, as a matter of public policy, you agree that there should be competition and consumer choice in the marketplace across the country, if you agree that there is a need for the different forms of distribution to be successful and get out there in the market, then it is not a very satisfactory solution to expect individual, entrepreneurial, start-up companies, who are relatively less well funded, to take on some of the country's largest companies on a case-by-case, market-by-market basis in antitrust litigation. That's why, although legal remedies are available, they are not really completely satisfactory from an industry perspective, or indeed from a public policy perspective.

Senator INOUYE. Thank you very much. Mr. Phillips?

STATEMENT OF BOB PHILLIPS, CHIEF EXECUTIVE OFFICER, NATIONAL RURAL TELECOMMUNICATION COOPERATIVE, ALEXANDRIA, VA

Mr. PHILLIPS. Thank you very much, Mr. Chairman. I am Bob Phillips, and I am the chief executive officer of the National Rural Telecommunications Cooperative.

NRTC is a national organization. We have 570 rural electric and telephone systems who are providing Rural TV—our programming service for satellite dish owners—to 55,000 subscribers.

NRTC does support S. 12, and we believe that this subcommittee should accept no less than universal access to cable television programming on fair and nondiscriminatory terms for all competing delivery technologies.

Our challenge of extending service to rural areas has been extremely difficult because of the cable monopoly's efforts to thwart our development. You would think, Mr. Chairman, that after 5 years the dish industry would have worked out its competitive problems, but that is not the case.

Noncable distributors like NRTC have been denied access to programming, and when it has been made available it has been at unreasonably discriminatory rates. I would like to give you just one example. There are others in my filed remarks.

Today, Turner Network Television, TNT, serves more than 50 million cable homes. That is 90 percent of the cable homes in the United States. Yet, TNT, with its exclusive distribution policy that Mr. Turner spoke of earlier, serves only 12 percent of all dish owners who subscribe to programming, 12 percent versus 90 percent for cable.

So while Mr. Turner has done great deeds, delivering CNN and attracting worldwide attention through coverage of the war in the Middle East, he has really done nothing to promote delivery of satellite TV to rural America.

TNT's access has denied, essentially all noncable distributors access to the product. And as you heard from Senator Gore, I, myself, as a dish owner, tried to subscribe to the service, was referred to my cable operator, and then denied access.

I want to thank Senator Gore for arranging for service for me, but what about the other 88 percent of the dish owners who do not have TNT today.

Senator PACKWOOD. They can all call Senator Gore.

Mr. PHILLIPS. Well, I suspect that they have probably gotten either turned down like I did by their local cable operator, or they may have gotten the run around between the back office service of Turner and their cable operator.

As a distributor, I would also like to say that we just do not understand why Mr. Turner would, of his own volition, refuse to sell his product to more eyeballs—to extend service. And we think it is even further amazing that the NFL and the NBA, who have sold exclusive games to TNT, would allow this bottleneck in the market to continue to be present.

As a distributor, I would say to you that NRTC is paying $10 at wholesale for 18 channels of programming. A cable operator, even a small one, would pay $2.25 for the same 18 channels.

And I ask, why should rural Americans be forced to pay in total, about 600 percent more to watch a movie, to view an NFL game, to be educated, or to watch the plight of their loved ones halfway across the world?

NRTC and others, the dealers, distributors, equipment manufacturers, involved in the home dish market are committed to making the marketplace work and develop to its full potential. But we do need your assistance.

I want to conclude my remarks by saying that NRTC is also very excited about the potential of high power, direct broadcast satellite service. That was eluded to here today.

For consumers, we believe that DBS represents the best potential for a new world of video, audio, and data services direct to the home at a very reasonable price. And I would note that because of the Congress's interest in developing a comprehensive national energy strategy, DBS also represents a new pathway to the home that utilities, like our members, could use for load control purposes. And we are very intent on searching that out.

But I would say in closing, that the DBS challenge is to obtain access to programming at cable comparable rates. We will continue to push forward with our C-band efforts and we will also work to develop the potential of DBS because that technology really represents the best way to have universal service and, perhaps, competitive service throughout the U.S.

We hope you will continue to be supportive of us in our effort to bring affordable and convenient service to the rural areas.

Thank you.

[The statement and material referred to follows:]

STATEMENT OF BOB PHILLIPS
CHIEF EXECUTIVE OFFICER
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

HEARINGS REGARDING
THE CABLE TELEVISION CONSUMER PROTECTION ACT OF 1991, S. 12
COMMUNICATIONS SUBCOMMITTEE
SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
MARCH 14, 1991

Thank you, Mr. Chairman and members of the Subcommittee. My name is Bob Phillips and I am the Chief Executive Officer of the National Rural Telecommunications Cooperative (NRTC), a national organization of 570 rural electric and telephone systems providing more than 55,000 subscribers with "Rural TV™" home satellite dish (HSD) service.1/ I am also representing the National Rural Electric Cooperative Association (NRECA), the national service organization for more than 1,000 member owners and controlled, not-for-profit rural electric systems.

I thank the Subcommittee for holding these hearings for the purpose of reviewing the Cable Telecommunications Act of 1984 and working to establish an overall policy which will best serve the video marketplace and consumers of the United States.

We support the "Cable Television Consumer Protection Act of 1991" (S. 12). This bill recognizes that in order to have a competitive market and to achieve the goal of universal

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1/ "Rural TV"™ is the registered trademark for NRTC's satellite television package of basic and premium channels.

access to television service, there must be access to programming at nondiscriminatory prices, terms and conditions to all delivery technologies.

NRTC and its members are committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis, in an easy and convenient manner -- just like cable television services are provided in urban America. NRTC has never believed that its mission was to compete "head to head" with cable operators to serve consumers who have access to hardwired cable facilities. Rather, the goal of NRTC and its rural utility members has been to extend universal access to television to rural Americans who cannot receive cable service. We believe there may be as many as 20 million homes outside the reach of cable, which have been denied the benefits of the modern telecommunications age. It is clear that the cable industry has no intention of extending cable service to these consumers.

NRTC's members, the rural electric and rural telephone systems of this nation, have been leaders and experts in extending essential services to remote areas that other service providers have not been willing to serve. In the same spirit of bringing services to rural areas, NRTC represents a collective national effort to provide home satellite dish service to subscribers who live beyond the reach of hardwired cable systems. Additionally, approximately 200 rural telephone systems are involved in providing cable television to lesser populated areas pursuant to the "Rural Exemption" provided in the Cable Communications Policy Act of 1984. Some rural electric cooperatives are also providing multi-channel, multi-point distribution service (MMDS) in rural areas.

NRTC is proud of the efforts of its members and other rural electric and rural telephone systems which are working diligently to bring the benefits of universal telecommunications services to the far reaches of our nation. This job of extending service has been extremely difficult because of the efforts of the cable monopoly to thwart the development of any alternative delivery technologies which pose potential competition to cable. We are pleased to share with you our experiences over the past five years in developing the home satellite dish market.

Since NRTC's creation in 1986, we have appeared before this Subcommittee almost annually to update the members concerning our progress in bringing home satellite dish (or "television receive only" -- TVRO) service to rural America. Mr. Chairman, you would think that after five years the satellite industry would have solved its problems in the marketplace. Unfortunately, that is not the case.

Despite Congress' assistance, the home satellite dish market has been plagued since the beginning with problems that are well known to this Subcommittee. The cable industry has carefully controlled the competitive potential of the home dish market by:

(a) denying or restricting access to programming by non-cable affiliated HSD distributors;

(b) demanding discriminatory wholesale pricing for HSD programming; and

(c) imposing unreasonable and unnecessary operational constraints on HSD distribution by non-cable affiliated distributors.

All of these elements have worked to the advantage of the cable industry by stifling competition from HSD technology, even in rural areas which are not hard-wired for cable service.

Lack of Access to Programming

This Subcommittee should accept no less than universal access to television programming on fair and non-discriminatory terms for all delivery technologies. Today, programming access for competing distributors and for consumers who use non-cable technologies is sadly lacking. Let me provide just a few examples.

While Ted Turner and CNN News have attracted worldwide attention through their coverage of the war in the Middle East, they have done nothing to promote access to their programming in the home satellite dish market. Mr. Turner has sought to expand distribution of his programming throughout the world, but the "cable exclusivity" policy of Turner Network Television (TNT) has unnecessarily restricted viewing of key programming by his fellow rural Americans using HSD technology.

TNT's refusal to sell to NRTC provides a clear example of how restricted access has negatively affected the diversity of programming available in rural America. TNT was launched in 1988 as a new "cable exclusive" service, with the goal of achieving significant penetration of subscribers as quickly as possible. The channel did achieve significant penetration in the cable industry, reaching more than 30 million subscribers in less than 12 months. Today, TNT serves more than 50 million subscribers, which is 90% of the cable market.

Distribution of TNT in the dish market, however, is another story. HSD distribution is limited to cable operators within their own franchised areas and adjacent counties or through TNT's own HSD "back office" telemarketing facility. As of last November, when TNT again refused to sell to NRTC, TNT had reached only 83,000 subscribers, which is a mere 12% of the home satellite dish market.[2/] Adding NRTC's 55,000 subscribers to TNT's HSD subscriber base would significantly increase distribution of TNT, yet TNT still refuses to deal with NRTC. It is clear that TNT's cable exclusivity policy has seriously limited distribution in the HSD market.

I can also testify firsthand that TNT's limited distribution has denied access to TNT to satellite dish owners in general, and to me, specifically. Two weeks ago, when I called Turner Home Satellite Services to obtain an authorization for my satellite dish in Fairfax County, Virginia, I was referred to Media General Cable Company. When I called Media General, they refused to authorize my dish for TNT, and advised that I could obtain it only on cable. I cannot use my home satellite dish to get a clear, crisp view of an NBA playoff game, a Turner exclusive movie, or Turner's top quality original programming.

2/ See attached letter from B.R. Phillips, III, NRTC, to Scott S. Weiss, Turner Home Satellite, dated November 6, 1990, and Mr. Weiss' reply, dated November 12, 1990.

Mr. Chairman, over the past five years NRTC has proven to be a reliable distributor and a good partner to the cable programming industry in the distribution of their services in non-cabled areas. Why should access for distribution of TNT be denied to NRTC? We respect the investment that cable and Mr. Turner have made in the development of TNT. We want to help them broaden their distribution beyond the current 12% penetration in the home dish market so that they can see a better return on their investment.

We also do not understand why the NBA a the NFL, who have sold their product exclusively to Turner, continue to allow this unnecessary bottleneck in the marketplace. Mr. Turner is recognized as a leader and innovator in the cable television programming world. What other than the undue influence of the cable monopoly would motivate him to relinquish his right to distribute his own programming to the widest audience possible?

Discriminatory Pricing

Let me now turn to pricing. When programming is obtainable, NRTC is required to pay cable programmers on average 460% more than comparably sized cable companies are required to pay for the identical programming. For instance, the wholesale pricing disparity between NRTC's 18 channel Basic Plus Service and a comparable package by small cable companies ranges from a low of 233% to a high of 780%. In dollars and cents, this means that NRTC must pay more than $10.00 at wholesale for 18 channels while a small cable operator would pay less than $2.25 for the same 18 channels.

Nor is HSD retail pricing comparable to or lower than cable subscription rates. HSD subscribers are required to pay at retail 136% above that which cable subscribers are required to pay for a package of 30 basic cable channels. When the total cost to the HSD consumer in receiving these services is considered, including the cost of the HSD receiving equipment, the cost to the HSD consumer soars to nearly 600% more than cable subscribers pay.

Why should rural Americans be required to pay 600% more to be entertained, to watch an NFL game, to be educated, to track the stock market, to watch the weather, or to follow the plight of their loved ones engaged in a war on the other side of the world?

Let me give you a specific example. Superstation TBS, another of Mr. Turner's programming achievements, is delivered to NRTC by Southern Satellite Systems, Inc., a satellite

carrier owned by TCI, the nation's largest cable MSO. Southern also distributes the signal to the cable industry.

Southern sells the TBS signal to small cable distributors for $0.04 to $0.10 or less per month per subscriber. The best available monthly rate to NRTC as an HSD distributor of TBS is $0.90 per subscriber. After subtracting the copyright royalty fee of $0.12 per month per HSD subscriber, which the satellite carrier is obliged to pay pursuant to the SHVA, NRTC's effective rate for TBS is $0.78 per subscriber. The difference between Southern's wholesale distribution rates to NRTC as an HSD distributor and its rates to comparably-sized cable distributors is at least 800% and possibly as high as 2000% or more.

There is no cost justification or other valid basis for this type of wholesale pricing disparity by a satellite carrier. In this case, TCI and the cable industry cannot justify this disparity based upon the cost of creating programming. TCI does not create the programming. They simply re-transmit one satellite feed to the cable and the dish markets. Under the compulsory license, the copyright owners who produced the programming receive only $0.12 for their efforts. TCI gouges the home dish consumer for $0.78. It's ludicrous. The carrier gets six times more than the copyright holder.

NRTC's experience in programming access and pricing gives us great cause for concern for the future of competition in the marketplace. Programming content is the key to the success of any technological delivery system, be it cable, HSD, MMDS, SMATV or fiber optics. Without fair and equal access, the delivery system is doomed.

Unnecessary Restrictions

In addition to problems of program access and pricing, NRTC and its members also have experienced a multitude of anti-competitive and troublesome operational and contractual obstacles in distributing programming. Some cable owned programmers have required NRTC to guarantee performance in terms of subscriber sales. Others have required minimum payments regardless of the subscriber levels reached. Still others have restricted the geographic areas within which NRTC may serve, further preventing NRTC from being a national competitor in cable areas.

Mr. Chairman, that is a short summary of our efforts to work within the HSD marketplace. Programmers pick and choose those outlets to which they will provide distribution rights, and they set their wholesale prices. But they have not done so based on the quality of an organization's marketing expertise, the financial integrity of the distributor, the size of the potential market, or the lack of cable access. Instead, they have consistently favored the dominant delivery system for their product -- cable.

FCC Activities

We have also been active before the Federal Communications Commission in seeking enforcement of existing law and the development of regulatory policy.

In 1988, Congress enacted the Satellite Home Viewer Act, which allowed satellite carriers to serve the HSD market and prohibited them from discriminating against HSD distributors in the process. For over two years, NRTC has participated in legal proceedings before the Commission seeking to obtain fair pricing from the satellite carriers. We have shown repeatedly that the carriers, most of whom are owned or controlled by the cable industry, charge us at least 500% to 800% more than they charge cable companies for carriage of the same signals.

We are now in the midst of the Commission's Second General Inquiry into the satellite carrier discrimination problem. Further, we have filed Formal Complaints at the Commission seeking specific damages and other appropriate relief from the carriers. You may find it interesting to note that although the FCC has indicated it is "disturbed" by this problem, the carriers have taken the position that the FCC is powerless to act to correct it. For this reason, we are strongly recommending that you clearly include the satellite carriers within the ambit of S. 12.

This past year, we also participated extensively in development of the FCC's General Inquiry into policies relating to the provision of cable television service. We are pleased to note that the Commission has recommended to Congress that specific legislation be enacted to ensure that alternative multichannel program providers have fair and equitable access to programming. The Commission made this recommendation based upon evidence showing specific problems concerning program access. As the Commission noted:

> Insuring fair and equitable program access is the key to fostering the development of vigorous multi-channel competitors to cable.

Direct Broadcast Satellite Service

We hope Congress will give assistance to current technologies which provide potential competition to cable and extend service to areas unserved by cable. With a level playing field, the future for growth of these technologies is bright. NRTC is committed to pursuing the development of the HSD market.

NRTC is also very excited about the potential to bring universal television access to rural areas through Direct Broadcast Satellite (DBS). Satellite technology has evolved to the point where reliable high power satellites can be placed in orbit. With compression technology, these satellites can deliver hundreds of channels of programming direct-to-home throughout the nation. Digital compression delivers high quality video and audio, far superior to that delivered over cable systems today.

The high power of DBS satellites enables the signals to be received over very small antenna. This technology meets all the criteria which NRTC believes are necessary to provide universal access to television. For consumers, DBS promises a new world of video and audio entertainment, education and information at a reasonable price.

For NRTC's rural utility members, DBS also creates a new pathway to the home for purposes of controlling peak demand for electricity. This potential benefit extends far beyond universal video service in competition to cable. Reduction of energy demand will contribute to the nation's overall energy efficiency, reducing the need for power generation and power plant construction. All of you are well aware of the focus of our nation and the world in conserving our energy resources and saving our environment.

Mr. Chairman, it is clear to NRTC that DBS can be successfully implemented. The satellite technology is available. Consumer demand is real. And NRTC and its members have the experience, financial resources and the ability to provide a new service to millions of rural Americans while meeting the demands of the nation's energy policy.

The challenge, Mr. Chairman, is to obtain access to programming at cable comparable rates. In the coming weeks and months, NRTC will be moving forward with its plans to develop DBS service. We will call on the programmers to make their service available for DBS delivery.

We hope that we will continue to have this Committee's support, and the support of the entire Congress, in our effort to bring affordable and convenient service to rural America.

Once again, Mr. Chairman and members of the Committee, NRTC and NRECA support passage of S. 12. Our recommendations for specific changes in the language of the bill are attached.

Thank you.

NATIONAL
RURAL
TELECOMMUNICATIONS
COOPERATIVE

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April 3, 1991

The Honorable Daniel K. Inouye
Chairman, Commerce, Science &
Transportation Committee
Communications Subcommittee
United States Senate
Hart building
2nd & C Streets, N. E.
Washington, DC 20510

Dear Senator Inouye:

This letter is to provide additional information for the record as you requested in conjunction with my testimony before your Subcommittee on March 14, 1991, in connection with the hearings regarding pending cable legislation.

In testimony, I stated "The wholesale price of NRTC's basic plus 18 channels is 460 percent higher than cable wholesale prices. In dollars and cents, this means that NRTC pays more than $10 at wholesale for 18 scrambled channels while a small cable operator pays less than $2.25 for the same 18 channels". The 18 scrambled channels included in NRTC's basic plus Netlink package are listed below:

CNN
Nickelodeon
The CBN Family Channel
Headline News
WGN
KTVT
The Weather Channel
ESPN
USA Network

Lifetime
WTBS
WPIX
The Nashville Network
KRMA (PBS-Denver)
KCNC (NBC-Denver)
KUSA (ABC-Denver)
KMGH (CBS-Denver)
KWGN (Ind-Denver)

In making the comparison between NRTC's costs for these services vs. cable wholesale costs, we deducted the copyright payment from the amount which NRTC pays to the satellite carriers for the distant signals included in the package. Without the copyright payment included, we then compared NRTC's costs to the cable operator's costs for the identical cable programming and distant signal carriage. NRTC's cost for the 18 channels is exactly $10.02. Based upon contracts which were available to NRTC from small cable operators, published trade article information, and published rate cards of basic cable services, we determined that a small cable operator would pay at most $2.25 for the same 18 channels. The average difference in cost is 462 percent. The actual difference between what NRTC pays at wholesale and what a small cable operator would pay for these identical 18 channels ranges from 233 percent to 780 percent.

Unfortunately, NRTC is unable to provide the pricing information for each of the programming services and satellite carriage which it receives due to confidentiality clauses in its wholesale purchase contracts. We can, however, give precise pricing information with respect to the following services.

Southern Satellite Systems, a wholly-owned subsidiary of Tempo Development Corporation, which is owned by TeleCommunications, Inc. (TCI) has insisted that NRTC pay 90¢ for carriage of superstation WTBS if included in NRTC's basic package or $1.10 if offered to consumers on an a'la carte basis. Thus, deducting the 12¢ compulsory copyright payment which Southern Satellite Systems must remit directly to the Copyright Royalty Tribunal, NRTC pays 78¢ per subscriber per month for carriage of superstation WTBS. Southern Satellite Systems' standard rate card rate for carriage of superstation WTBS for a cable operator or a small master antenna TV operator is 4¢ - 10¢. It is common industry knowledge that larger cable operators pay rates which are only a few pennies for carriage of superstation WTBS. It is also common industry knowledge that large multiple system operators (MSOs) have rates which are capped and thus pay even less for carriage of superstation WTBS on a per subscriber basis.

Netlink USA, which provides five Denver network superstation signals included in NRTC's basic plus Netlink package comparison, is also owned by TCI. Netlink markets the five Denver stations to cable distributors for 58¢ per month per subscriber. It delivers the same five channels to NRTC for $3.25 per month per subscriber. NRTC's adjusted rate for Netlink's signals, normalizing the copyright distinction between cable distribution and home satellite distribution, is $3.01 ($3.25 minus 24¢ copyright fee). Compared to the 58¢ rate, which cable distributors pay for carriage of the five signals, the wholesale price disparity to NRTC is 519 percent.

I have attached a schematic to further explain the comparison. Those examples are the best documented evidence of discrimination which NRTC can provide the Subcommittee for review without an agreement from the programmers and satellite carriers to release confidential contract information.

I would also like to call to your attention, a letter recently addressed to Chairman Al Sikes by Mike Schroeder of Consumer Satellite Systems of Fishers, Indiana, dated March 21, 1991. You should have received a copy of this excellent letter with attachments that further document access and price discrimination against home dish distributors.

We trust this information will be helpful to the Subcommittee. We will pleased to provide any additional assistance as required.

Very truly yours,

B R Phillips III

B. R. Phillips III
Chief Executive Officer

COMPARISON OF WHOLESALE COSTS
CABLE VS. NRTC

NRTC's Rural TV Basic Plus Netlink Package	Cable Wholesale	NRTC Wholesale
CNN & Headline News	$ .21	*
ESPN	$ .25 - $ .35	*
The CBN Family Channel	$ .08	*
Nickelodeon	$ .15 - $ .23	*
WGN (Ind-Dallas)		*
KTVT (Ind-Dallas)	$ .28	*
WPIX (Ind-NY)	$	*
The Weather Channel	$ .07	*
USA Network	$ .18	*
Lifetime	$ .12 - $ .15	*
The Nashville Network	$ .12 - $ .15	*
WTBS	$. 10	$ .78
KUSA (ABC-Denver)		
KMGH (CBS-Denver)		
KCNC (NBC-Denver)	$ .58	$ 3.01**
KRMA (PBS-Denver)		
KWGN (Ind-Denver		
TOTAL	$2.25	$10.02**

* NRTC is prohibited from revealing price due to mandatory confidentiality clause in contract.

** Adjusted to reflect copyright fee paid by the satellite carrier.

All costs are per subscriber per month.

Senator INOUYE. Thank you very much.

Mr. Schmidt, you reported that your members have access to all cable services with the exception of TNT and another one.

Mr. SCHMIDT. And the regional sports services, Senator.

Senator INOUYE. And you indicated that although you have access, you have to pay a high price.

Mr. SCHMIDT. As a general statement, our terms and conditions are considerably higher than the cable operators.

Senator INOUYE. Would you furnish this committee comparative prices?

Mr. SCHMIDT. I would be more than happy to, sir.

Senator INOUYE. Mr. Phillips, can you do the same thing?

Mr. PHILLIPS. I can do the same, sir.

Senator INOUYE. I would assume that you are paying higher too?

Mr. PHILLIPS. Yes, sir. As I testified, I cannot give you exact prices for each programming services because we are under confidential arrangements in our contracts. But the exact numbers I gave you, $10 at wholesale compared to what cable pays, $2.25, is very precise.

Senator INOUYE. Senator Packwood.

Senator PACKWOOD. Mr. Schmidt, just let me ask you a simple, technical question so I understand how wireless cable works as opposed to a direct broadcast satellite.

You take a signal off the satellite and you bring it down to your ground satellite, your ground receiving station, right?

Mr. SCHMIDT. What I would like to do for you, Senator, is just give you a walk through on how the technology works. The satellite programmer has his product up on the various domestic satellites. We take that product off of the satellite on a TVRO.

Senator PACKWOOD. On a what?

Mr. SCHMIDT. TVRO, television receive only antennae.

Senator PACKWOOD. Thank you.

Mr. SCHMIDT. So we receive the programming on our antenna. We then turn around and put that product through a scramble and addressable system and put it on a omni-directional broadcast tower. And up to 50 miles from the transmitter, we will distribute that product, rebroadcast that product to an antenna about the size of my two hands. And that is how it works.

It is a microwave distribution system. It is commonly referred to as MMDS, but it really is not because it involves many other distribution spectrum from the FCC.

Senator PACKWOOD. Apart from the fact that you scramble it, and I realize that it is received at the home or wherever it is received in a small dish, how do you differ, apart from that, in the method of transmission from a normal, over the air broadcaster where people pick it up with the little rabbit ears if it is over the air, on their television.

Mr. SCHMIDT. We use a different band. We are in the 2 gigahertz band.

Senator PACKWOOD. I understand that. But I mean, I am just talking about the person at home.

Mr. SCHMIDT. To the person at home, inside their home, it is cable.

Senator PACKWOOD. Right.

Mr. SCHMIDT. Once you come off the roof into the home, you have a set top converter just like a regular cable system.

Senator PACKWOOD. Now, as to direct broadcast satellite, the difference being the homeowner takes it directly off the satellite.

Mr. SCHMIDT. Correct.

Senator PACKWOOD. And they have a little cable running from their receiving dish into their house.

Mr. SCHMIDT. Correct.

Senator PACKWOOD. Now, are you in competition with direct broadcast satellites?

Mr. SCHMIDT. We would be in competition with the various competitors. This gentleman on my right and I would be competitors in one sense, and we like each other.

Senator PACKWOOD. Now, why, if you have to pay more for your programs, why on earth would anybody, and I was intrigued with your figure, who has cable, buy from you? What do you give them that cable does not?

Mr. SCHMIDT. Let me walk you through some economics, Senator. I think it would be very interesting for you.

The average cost to bill a cable subscriber in a current technology that cable is using, runs anywhere from $1500 to $1900 per subscriber to bill that subscriber. Our cost per subscriber, are about $350.

Senator PACKWOOD. How do you compete with an existing system?

Mr. SCHMIDT. An existing——

Senator PACKWOOD. They have already sunk their money in it. Now you are coming in to compete.

Mr. SCHMIDT. Corpus Christi, TX. Example. Corpus Christi, TX went on the air in May of 1990 with a 31-channel, wireless cable system. This past Friday, they had a celebration with their 10,000 subscriber.

There were some 2,800 subscribers in an adjacent community of Portland, TX, 2,800 cable subscribers. There are now 200 cable subscribers and there are now 2,600 wireless cable subscribers.

Senator PACKWOOD. Is your transmission to the house line of sight.

Mr. SCHMIDT. It is line of sight.

Senator PACKWOOD. All right. If you had access to programming on an equal basis, you would not need the rest of this bill. You are beating them hands down on price, I take it.

Mr. SCHMIDT. The answer is, it is like real estate, location, location, location. Today it is price. But is more than price. It is quality. It is keeping the service on. There are so many outages in a normal cable system wit a cascaded group of amplifiers, we do not have that problem.

Senator PACKWOOD. No, I understand that. All I am saying is, if you had fair access to programming, why would you need any of the rest of this bill?

Mr. SCHMIDT. The answer is, our focus is on fair access to programming.

Senator PACKWOOD. Well, that is what I am saying. You can give cable competition.

Mr. SCHMIDT. Absolutely.

Senator PACKWOOD. In fact, you are apparently even giving them competition now, having to pay greater than average prices for programming because you can deliver it, I assume, at a lower price and better quality.

Mr. SCHMIDT. Correct.

Senator PACKWOOD. Then, why do you need this bill, other than for the programming elements of it?

Mr. SCHMIDT. Senator, I testified over the past 2 years, on legislation in the Congress and I am going to give you a very simply illustration.

In 1988, the first hearing took place in the Senate Judiciary Committee and Senator Metzenbaum held a hearing and he talked about the problems of cable's monopoly. There were more laughters and guffaws in the audience from those respective people who were there representing cable's interest. They thought this was a joke.

I think what you have done, you and your colleagues, for Americans in the last couple of years by focusing on this issue, has turned up the heat. I am not here to pass legislation. I am not here to win lawsuits. I am here to get on with our business.

Senator PACKWOOD. I understand if you are part of a coalition, just tell them, and you do not want to break ranks. I understand that, if there is some kind of a deal here among everybody that wants this bill.

But, from you standpoint, your business, you are confident you can beat cable hands down if you have access to programming.

Mr. SCHMIDT. We can compete, Senator.

Senator PACKWOOD. And that would be damn good competition for cable.

Mr. SCHMIDT. Yes, sir.

Senator PACKWOOD. In fact, apparently better than good competition. You are beating them.

Mr. SCHMIDT. Well, again, small examples do not necessarily indicate where this is going to be across the board.

Senator PACKWOOD. Let me ask you, if you knew you had equal access to programming with them, are you confident you could beat them?

Mr. SCHMIDT. I think the consumer would be the winner.

Senator PACKWOOD. They would buy your product?

Mr. SCHMIDT. Again, if a cable operator does his job, and keeps his prices competitive, and keeps his service on line, then I think cable can do very well in the marketplace. They have more channels.

Senator PACKWOOD. I understand that. If you become a real serious competitor to cable, they are going to have to improve, in your judgement, their service, or their prices, or their something, and the consumer is the ultimate winner.

Mr. SCHMIDT. Absolutely.

Senator PACKWOOD. Thank you, Mr. Chairman.

Senator INOUYE. It has been a long day but I think it has been a fruitful day for the committee. We intend to carry out the schedule as announced and the record will be kept open until the 5th. And by the 19th, I would anticipate that all amendments will be submitted to us to give us time to circulate. And thereafter, the Chairman and Ranking Member will decide upon the final markup day.

So, realistically, you can expect some action on this measure sometime in late April or early May. So we intend to do something about this.

I thank all of your for your patience. I thank all of you for your testimony.

Mr. SCHMIDT. Thank you very much.

Senator INOUYE. The hearing is adjourned.

[Whereupon, at 7:02 p.m., the subcommittee adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Statement of

Alfred C. Sikes
Chairman
Federal Communications Commission

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to submit a statement regarding the comprehensive cable television legislation which the Subcommittee is now considering (S. 12).

Importance of Competition

Eighteen months ago, I appeared before the Subcommittee to discuss Federal Communications Commission (FCC) cable television policies, and to present my recommendations regarding a proposed cable bill which was similar to S. 12 in many regards. My statement described the rapid expansion of cable television which occurred following enactment of the 1984 Cable Communications Policy Act. I commended the cable industry for providing the American public additional and highly-valued electronic news, information, and entertainment choices. But I also noted several concerns which had grown in recent years, most notably those surrounding the issues of rising cable service rates and program availability.

My statement conceded that some of these concerns might be partially ameliorated by regulatory action. But I also stressed my strong personal preference for pursuing market-based, not re-regulatory, solutions. Increased actual and potential competition in local video service markets, I stated, could alleviate many public policy concerns, and would be far preferable -- and more effective -- than reimposing Federal and local regulation on the cable industry.

Both then and on subsequent occasions, I urged a change in the 1984 Act to eliminate the ability of local cable franchising authorities to grant monopoly franchises (47 U.S.C. §621(a)(1)). I called for relaxation of the current blanket statutory prohibitions on television licensee and most telephone company provision of competitive video services in the same area in which they provide broadcast and phone service (47 U.S.C. §§613(a), (b)).

I also suggested action to prevent vertically integrated cable companies from refusing to make programs available on reasonable terms to competitors, under certain limited conditions. Additionally, I stated that, if Congress chose to legislate regarding mandatory carriage by cable systems of local (or other) broadcast signals -- which I did not recommend -- that any such obligation be linked to the prevailing compulsory copyright regime.

My fundamental view regarding cable television has always been, however, that competition in video and other broadband services markets can -- and should be allowed -- to work. Market-based solutions, again, are preferable to any broad scale "re-regulation" of the cable television industry.

Subsequent Developments

In the course of testifying, I indicated that the FCC would accelerate a statutory reporting obligation under the 1984 Act (47 U.S.C. §623(h)), and provide Congress with a comprehensive review and assessment of cable market conditions by July 1990. To ensure a full, fact-based record, the FCC subsequently conducted an extraordinary series of field hearings across the country, in Los Angeles, St. Louis, and Orlando. The information which we developed through those hearings, as well as our usual notice-and-comment procedures, was carefully assembled and analyzed, and presented to Congress last July as promised.

The FCC's July 1990 Cable Report, a copy of which I would like to associate with my statement today, contained a number of important findings and recommendations. Those points which bear directly on the question of whether market-based policies can and will work, however, include the following:

- First, there is evidence that cable television system rates, service quality, and customer responsiveness are positively affected by competition. For example, in those relatively few markets in which there is either direct or "yardstick" competition between cable systems, rates on a per channel basis were some 30 percent below the national average. (Cable Report at App. H, p. 2)

- Second, there also is evidence that over-the-air alternatives to cable television -- particularly "wireless cable," or "MMDS" (multichannel multipoint distribution service) -- can be an effective competitive force. Advanced direct broadcast satellite technology also promises to have an affirmative, procompetitive effect.

- Third, the prevailing regulatory system presents difficult issues. Today, localities can franchise cable on a monopoly basis and, in effect, share in monopoly rents through the payment of large franchise fees, while extracting an array of concessions in return for protection from competition. There is little evidence consumers gain more from this approach, however, than they would from competition; indeed, experience in other communications markets suggests that competition would yield considerably larger consumer dividends.

- Finally, there appears to be some positive correlation between the level of actual or potential competition in cable markets and the pace with which newer plant is deployed. In those markets where there is direct competition, firms are competing on the basis of the technological sophistication and "feature-richness" of their offerings. This mirrors experience in other communications markets, where competition has proven to be a reliable spur to technology and innovation.

Subsequently, FCC proceedings were instituted and, in part, completed that will lessen Federal regulatory obstacles to the development of competition from "wireless cable." The FCC also continued to review evidence regarding the availability of programming to satellite service providers, with a view toward curbing any unreasonable discrimination.

"Effective Competition" Proceeding

Since cable rate legislation was then pending, the FCC's July 1990 report did not address the issue of possible changes in its 1987 "three-signal" standard defining "effective competition," which now precludes most municipal price regulation. Following adjournment of the 101st Congress without enactment of cable legislation, however, the issue of possible administrative changes in the 1987 standard was addressed.

Our 1991 Notice of Proposed Rule Making proposed possible replacement of the "three-signal" standard with a new, three-part test. Essentially, cable systems would not be subject to municipal rate regulation if --

- There are six broadcast signals available, and cable has less than 50 percent penetration; or,

- There is a competing multichannel provider available to 50 percent of the people in a cabled community with 10 percent subscribing; or,

- The cable company satisfies a behavioral test, charging no more than "competitive rates" (as measured against a number of possible standards) and complying with the National Cable Television Association's "Code of Good Practices."

Comments were due February 14, and reply comments March 1. The FCC currently plans to take action in this proceeding in May.

General Concerns Regarding S. 12

Like its predecessors, the pending cable legislation is a matter of concern because it does not address head-on the principal problem -- namely, legitimated local cable monopolies. Instead of amending the 1984 Act to require competitive franchising and to remove blanket bars on television and telephone company entry, S. 12 would impose extensive and intensive regulatory obligations on cable incumbents.

This approach conflicts with the competition model which the FCC has applied successfully in other communications businesses. In the 1970s and 1980s, for example, the FCC determined that the most promising solution to concerns regarding insufficient toll carrier responsiveness and non-cost based prices was to open long-distance markets to competition. A direct and immediate effect of those procompetitive policies was to spur investment in new technology -- on the part of both incumbent carriers and new entrants -- and to commence the process of long-distance telephone price reductions which has since occurred.

Similarly, in telephone equipment, the FCC during those decades also determined that the best means of ensuring customers had a broader choice at more cost-related prices was to eliminate a phone industry monopoly over provision of customer premises equipment. Again, the direct effect of sanctioning competition was to remedy problems which not even the most dedicated and conscientious regulators could have hoped easily to resolve.

Our positive experience of relying on competition in these areas, together with the evidence adduced in conjunction with our July 1990 cable report, strongly suggests that competition in video service markets such as cable television will work to the consumer's benefit as well. Certainly we have no conclusive basis to assume that cable television service constitutes a "natural monopoly," and only pervasive regulation can protect the public's interests. While it is true most local cable markets are now virtual monopolies, that is, many believe, a consequence of government action, not economic or marketplace forces. In virtually all instances in which competition has been allowed, the public has been the winner.

Negative Consequences of Discarding the Competition Model

Congress has the opportunity in passing new cable legislation to encourage the competition model which has served so well in other communications markets. Such a step would create incentives for technological progress and facilitate the advent of advanced communications networks.

A cable industry shielded by Government from both actual and potential competition, and saddled with extensive economic regulation, would have neither the incentive nor, most likely, the ability, rapidly to modernize its plant and facilities. Maintaining the current authority to prohibit the competitive provision of video distribution services, moreover, would most probably affect the pace with which telephone companies upgrade their facilities. In effect, strong disincentives to investment and innovation might be established legislatively for both industries. As a result, the United States could have, in effect, parallel monopoly networks -- a one-way broadband network, and a two-way narrowband system -- neither of which would have an appreciable market-driven incentive to upgrade their facilities. We would not have a competitive, market-driven environment that could accelerate the deployment of switched, two-way, broadband communications facilities.

International Comparisons

Were this to occur, the negative consequences for the United States might ripple well beyond simply the narrow cable television and local telephone industries. This is because communications is an increasingly important factor of production, and means of improving the efficiency with which capital is employed. Communications products are also a growing component of overall world trade. The performance of communications facilities producers, moreover, is dependent in significant part on the level of domestic equipment demand.

Several of our leading trade and technology rivals, most notably Japan and Germany, already have large scale programs underway to deploy state-of-the-art fiber optic communications networks serving both business and consumer's evolving needs. Planned and already under construction are two-way, switched broadband communications facilities in much of Japan, as well as most of eastern Germany.

These countries have a tradition of strong government direction and direct involvement in communications. The goal of switched broadband systems is being pursued for the complementary purposes of upgrading national communications capabilities and stimulating domestic demand for high-technology products (which can then, of course, be aggressively marketed abroad).

Recommendations

In lieu of the regulatory approach reflected in S. 12, I again recommend that Congress take affirmative steps to foster competition. As the Commission stated in its July 1990 cable report, statutory obstacles to competitive franchising should be removed.

The Commission also urged Congress to address the issue of vertically integrated cable companies and programming access. We believe there should be an obligation to license programs on reasonable terms and conditions, as access to programming may be an essential ingredient to facilities-based competition. This should only be required in those markets where the same company has both a distribution monopoly and program ownership.

The Commission will be taking up the issue of telephone company participation in video service delivery later this year. Congress should address the current outright statutory ban on phone company competition in cable. At the same time, Congress should consider legislation removing any barriers to participation in telephony on the part of cable television companies. Cable companies should be permitted, indeed, encouraged to make maximum use of their plant and facilities. We stand ready to assist the Subcommittee to craft appropriate legislation.

Regulatory Resources

If Congress nevertheless chooses to enact cable legislation along the lines of S. 12, steps should be taken to provide the FCC with the budget resources needed adequately to administer the new law. As reported to the Subcommittee last year, the FCC does not now have the ability to absorb the many new procedural and other obligations which this bill envisions.

Again, we stand ready to work with the Subcommittee and its expert staff to develop alternatives.

Conclusion

American experience in communications amply demonstrates that competition can in fact function as an effective, indeed, superior surrogate for detailed and intrusive regulation. There is no good ground to assume that the tradition of reliance on competition which has proven so successful in other fields is inapplicable to cable. Rather, there is good reason to assume that competition is the optimal approach, and an approach that will benefit both cable subscribers and the United States economically as well.

Testimony of
Charles C. Hewitt
President, Satellite Broadcasting
and Communications Association
before the
Subcommittee on Communications
Senate Commerce, Science, and Transportation Committee

March 14, 1991

Mr. Chairman and members of the Subcommittee. My name is Chuck Hewitt. I am president of the Satellite Broadcasting and Communications Association of America, and I am pleased to appear before you today. As many of you know, while the satellite broadcasting industry is a youthful one, it contains immense potential to become the most immediate, true multichannel video provider available to offer competition today. I have been part of the satellite industry for many years, both as the head of the national trade organization which represents the industry and, prior to that, as an executive in a multinational communications and satellite company. The many members of our industry who have made substantial economic committments to its success have done so because of their firm belief that it is the technology of the 90's -- the "Decade of the Dish."

We have all recently been the beneficiaries of the efficiencies and benefits of satellite technology at its best. During the Gulf War, the major news organizations utilized satellite extensively to transmit near instantaneous news and information to the American public. You may recall that in many of the TV newscasts seen from Saudi Arabia, for example, an "uplink" dish was readily visible in the background. While the newscast was taking place, the "uplink" provided a "live" feed to a satellite which relayed the broadcast to various news centers. The signal was, in turn, retransmitted via satellite direct to a cable head end or direct to-the-home, whichever the case may have been. As a matter of interest, 24-hour "pool feeds" transmitted in the clear were also received by home system owners -- a "live" feed in every sense of the word.

The wonders of satellite technology which the press have already "discovered" are also being enjoyed by the more than 3 million American households which own satellite receiving systems. It is these very benefits which stand to propel satellite broadcasting into the role which I have just described -- the most readily available, true multichannel video provider. To fulfill that role, however, we need the creation and development of a communications policy such as the one so wisely set out in S.12. We commend the sponsors of the bill for their objective of expanding the availability of home satellite to consumers as a matter of public policy, and for their foresight in using program access as a market place tool to assist our industry in taking its rightful place in offering news, entertainment and information to the home. I will discuss this issue shortly in more detail.

The satellite delivery systems and technology to forward that policy are already in place. So our association supports the measures in this bill which will encourage every American household which seeks the most diverse and highest quality video programming to acquire it in a fair and equitable market environment. Thus, we are very pleased to see the Subcommittee's determination in creating a public policy which will allow new multichannel providers such as satellite to compete on a so-called "level playing field."

Our membership comprises the major elements which go into transmitting video programming to the home: satellite system operators, video programmers and distributors, manufacturers of receiving equipment, and the retailers who actually sell both systems and programming to the public. The SBCA represents the entire chain of providers integral to the transmission of satellite broadcasts to the consumer, from beginning to end.

Senate Bill S.12, which is under consideration by this Subcommittee, is of great interest to the satellite broadcasting community. As I have already indicated, our industry is a broad one. SBCA members offer the current C-band DBS home receiving systems which are growing at the rate of over 30,000 per month, and the newer Ku-band DBS systems which are just now coming onto line and being made available to the consumer. (The "C" and "K" band designations simply refer to broadcast frequency bands. Satellite systems in both bands broadcast directly to-the-home.)

Our industry is also technology driven. The picture quality attainable by satellite cannot be matched by either terrestrial broadcasters or cable. Neither can the digital audio reception integral to satellite delivery. Because of the high quality, more than 40% of existing C-band satellite receiving systems are located in areas already served by cable. We believe this number will grow as more and more households both recognize the dollar value and high quality of satellite and turn to it as their primary means of receiving entertainment, news and information.

Satellite broadcast of video programming also promises new delivery techniques such as video compression and digital encryption. Existing satellite systems are already capable of delivering HDTV, and in fact do so today in Japan, with Europe shortly to follow. For example, new Direct Broadcast Satellite entrants have successfully compressed up to 8 channels onto a single satellite transponder (a video carrier which transmits one standard TV signal). One entrant boasts of an 80-channel system utilizing only 10 standard satellite transponders. Compression will enable it, as well as other ventures, to deliver more programming at less cost to consumers. New digital encryption techniques will lead to more secure program delivery. As a result, programming revenue streams will be increased, and we can expect to see more original, quality programming made available for household viewing.

The most outstanding characteristic of our industry, however, is its entrepreneurial drive. It is this outlook which has resulted in the rapid technological advances we are witnessing in the satellite field. It is also the determining factor in our industry's approach to the legislation which is before you today.

As I have discussed earlier, the principal concern of the satellite industry is the issue of program access. That concern has been well addressed in S.12 as it is currently crafted. The section of the bill which deals with program access and non-discrimination in the sale of programming is constructive and will serve well the goal to which it is directed - to stimulate competition by alternate multichannel video providers.

Program access is also closely tied to the ability of satellite system entrepreneurs to implement their projects. It is a classic "chicken and egg." For example, as more households learn of the vast amount of programming that is available to them through C-band satellite, they will have more incentive to purchase TVRO systems. The result can only be increased competition to existing video providers. Similarly, DBS system operators need program access to induce prospective investors to participate in a home satellite project. Past experience has shown that these investors will be more secure with the knowledge that quality programming is available to get the project up and running.

The satellite industry believes that utilizing market place tools such as program access is the most preferable way to create competition. Thus SBCA supports S.12 in its entirety. In considering the rate regulation side of the bill, however, we should not lose sight of the cable industry's contributions in the area of programming, not to mention the growth of independent cable services. This has come about because the revenue streams the industry has generated have allowed the funding of new and popular programming which in turn has attracted new subscribers.

On the other hand, a carefully crafted program access feature, such as the one contained in S.12, has the potential of helping to create the long awaited "level playing field" among existing video providers. When the cable industry began the long road to achieve the dominant position it holds today, it did so (and still does) with the benefit of a Congressionally mandated "compulsory license" enabling cable systems to carry popular distant signal programming at favorable rates. The satellite industry is not asking for any such permanent license. Program access however stands to offer a more fundamental, market place oriented method to assist new delivery technologies in getting to the starting line without materially affecting the operations of incumbent technologies.

In connection with program access, a great deal of consideration has also revolved around the issue of program exclusivity. We believe it proper that the Subcommittee did not incorporate it into the concept of program access. We question whether program exclusivity lends itself to the "level playing field" the Subcommittee is trying to achieve, pending the development of a more fully competitive market environment which a program access feature aims to create. However, once fair market competition has been established, we would agree that program exclusivity has its place in helping to differentiate between competing services.

In the same vein, we laud the inclusion of language mandating program access for C-band systems. They are the receiving systems most prevalent today, and we expect their growth to continue at an ever increasing pace in the forseeable future. But as I have previously stated, satellite broadcasting to-the-home is "frequency blind." That is, there should be no distinction between C or K-band systems for the purposes of this legislation because they both embrace the same function of delivering satellite programming to the home, and each band bears the capability of offering alternate multichannel video delivery in its own right. We maintain that extending mandatory access to Ku-band as well is essential to the fulfillment of the Subcommittee's goal of stimulating competition, and we urge the Subcommittee to do so in this legislation. The advent of Ku-band systems and the promise they hold for smaller dishes as well as video compression can only further benefit the consumer and enhance the prospect of viable competition.

It is appropriate at this juncture to comment briefly on another aspect of competition -- the entry of telephone companies into the delivery of video programming. Because the Bell Operating Companies today already have access to virtually every home in the U.S., they are perceived as a natural competitor to cable. It is a position which has been espoused by a number of members of Congress and discussed widely in the Administration and at the Federal Communications Commission. In fact, in some quarters the telco's are viewed almost as saviors for no other reason than they are already in place.

I stated earlier that the satellite industry is entrepreneurial. Because we are free market oriented, we believe that every enterprise should have the opportunity to demonstrate its worth, and that the public will ultimately decide which means of delivery most suits its video needs. Our position is no different with regard to the telco's. But we must approach this complex issue with our eyes open.

There is no doubt that the telephone companies can be formidable competitors to cable, and there may even come a time when their entry as video providers may become a desirable public policy. The issue however will revolve around the ability of the public policy makers to prevent the creation of another local monopoly with even more power than before which controls all communications to the home. Many purists are confident that imposing arm's length investment and operations requirements on the telco's can circumvent the evils of cross-subsidization. Theoretically a BOC's video provider would then be on similar economic footing as a local cable company or even a national DBS operation.

While all this may be possible, we would caution the Subcommittee that if fibre is integral to the telco's entry into this field, they are already well on their way to achieving a high capacity wired environment through the benefits of cross-subsidization by existing telephone subscribers. In other words, if and when the Congress allows for telco entry, a substantial amount of fibre may already be installed on beneficial terms outside the context of "arm's length." At that point, we would question the ability of the regulators to distinguish between what is attributable to the voice network as opposed to the "arm's length" video unit for the purposes of ensuring equitable competition.

I would be remiss if I did not raise a remaining issue which is deeply affecting the satellite industry today -- and that is the matter of zoning. In 1986, the FCC promulgated rules whereby local zoning ordinances which discriminate against satellite receiving antennas - that is, specifically treat them differently from other receiving antennas - are preempted. A municipality can differentiate between TVRO systems and other antennas only in those instances which have a "reasonable and clearly defined health, safety or aesthetic objective" and "do not operate to impose unreasonable limitations on, or prevent, reception of satellite-delivered signals by receive-only antennas, or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of equipment" (CC Docket No. 85-87). Thus differentiation is permitted if at all, only under very narrow circumstances and under limited conditions.

Unfortunately, the FCC's policy has been widely ignored by many municipalities as well as local courts all over the country. Both the SBCA and the FCC have a myriad of complaints from satellite users, and would-be users, of ignorance or unwillingness to recognize the FCC rules by local jurisdictions. Through their zoning ordinances, building codes, or sheer bureaucratic weight, the localities are flying in the face of the FCC's preemption rules and preventing households from acquiring or using home satellite dishes.

Private action is currently being sought at the Commission, and the SBCA will soon be petitioning the FCC itself for clarification and refortifying of its rules. But even in the best of circumstances, it is difficult to enforce the FCC's preemption rule because of the bureaucratic power which jurisdictions are subjectively exercising over the installation of TVROs.

We suggest to the Subcommittee that it grant the FCC sufficient enforcement authority in this matter to act against jurisdictions which willfully violate its preemption rule on TVRO's. For example, in the SBCA's comments to the FCC in the "effective competition" proceeding, we recommended that a cable franchising authority in a community whose zoning ordinances did not conform with the FCC's preemption rule be denied its charter to regulate a local cable system until the community came into compliance.

Such authority would first bring to account the many municipalities which willfully, and often arrogantly, ignore the FCC's rules. But just as important, it will afford the viewing public the opportunity to truly select the video medium of its choice, unfettered by the private or subjective policies of local bureaucracies. This alone can make a strong contribution to foster video competition at the local level. It will instill confidence in the consumer that freedom of choice in the selection of video medium has been retained; and in the satellite industry that a serious obstacle to the availability of TVRO's to the public has been removed. We would be pleased to work with the Subcommittee in crafting appropriate legislative language to deal with this important issue.

In summary, we commend the sponsors of S.12 for their foresight in identifying program access as an essential means of stimulating the growth of alternative multichannel video providers and for insuring that, at a minimum, it is mandated for C-band receiving systems. We would urge that it be extended to all satellite systems in all frequencies, both C-band and Ku-band DBS, for the very same reasons. I would also like to thank the Subcommittee for this opportunity to present the views of the satellite broadcasting industry. Many of our industry's members are heartened by the support and encouragement we have seen through the consideration of such legislation as S.12, and we are happy to work with you to see it become a reality. Thank you.

Statement of the

Association of National Advertisers, Inc.

Mr. Chairman and Members of the Subcommittee:

The Association of National Advertisers (A.N.A.) appreciates this opportunity to submit its views on "must carry" requirements for cable television. The interest of national advertisers in "must carry" is simple and direct: our members want a reasonable opportunity to reach as many American consumers as possible at the lowest cost. A.N.A. is neither pro-broadcast nor pro-cable. Rather, our members are pro-competition. A.N.A. strongly believes that "must carry" rules are a crucial component of a healthy and productive national communications policy. Without "must carry" requirements there cannot be equitable competition between the networks, independent television stations and cable.

Our members' interest in reaching the most consumers at the lowest cost furthers the interest of the public in receiving commercial information in the most cost-efficient manner possible.

As many members of the committee are aware, A.N.A., the industry's oldest trade association, is the only organization exclusively dedicated to serving the interests of corporations that advertise either regionally or nationally. The Association's advertiser membership is, in composite, a cross section of all segments of American industry. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a variety of goods and services and collectively account for almost 80 percent of all annual regional and national advertising in the United States.

A.N.A. believes that a cornerstone of the "must carry" controversy is the issue of media revenue, especially advertising dollars. Any action taken on cable legislation therefore will have a major impact on national advertisers and consumers.

Advertising dollars spent on cable television have grown astronomically in recent years, from $815 billion spent in 1985, to $1.9 billion in 1989. By 1995, the figure is projected to reach $5 billion. How advertisers allocate their budgets on national television networks, independent television stations and advertiser-supported cable stations will be significantly affected by Congressional action on the "must carry" issue.

A.N.A. believes that the underlying basis of the "must carry" debate is a battle between the media over revenue they derive from advertising. Any action taken by Congress on "must carry" therefore will have a major, direct impact on national advertisers and consumers.

"Must carry" rules are essential to ensure that cable systems do not misuse their "gate-keeper" position to exclude or financially penalize broadcast competitors, thereby undermining a healthy media environment to the detriment of advertisers and the viewing public.

Cable systems have enormous power to control the media marketplace in the areas they serve through the access to cable retransmission that they provide to broadcasters. They have the power to deny access completely, and they have the power to manipulate access through channel positioning.

It should also be noted that in many areas of the nation, consumers have no choice but to subscribe to cable in order to receive clear signals of broadcast stations. A major reason many people subscribe to cable television is to ensure clear reception of broadcast signals in their area. This is true of rural areas as well as urban areas. For a variety of practical reasons including terrain, urban "concrete canyons," zoning and other limitations on antennas, a large percentage of local stations not carried on local cable systems will not be seen in cable households. It should be noted, that cable penetration has since 1987 exceeded 50 percent of American homes and the figure continues to climb rapidly. In 1989, cable penetration of American households exceeded 57 percent and it is expected to reach 65 percent by 1992.

In addition, it should be noted that in many areas of the country, cable subscribers cannot choose among cable systems to obtain the programing they desire. There is often only one system serving a particular area, and consumers face a "take it or leave it" situation in regard to the cable choices available in their viewing area. Consumers should be assured that when they subscribe to cable television, they will continue to receive the over-the-air programing, including network and non-network programing as well as the vital local news programs on which they depend.

Similarly, advertisers who have purchased commercial time in primetime and other popular programs, are at the mercy of cable operators who may or may not carry the signals of the over-the-air stations that broadcast these programs.

As a general proposition, A.N.A. favors regulation only where necessitated by impediments to free market operations. The inherent monopoly characteristics of cable television systems constitute such an impediment. Without "must carry" requirements, cable operators in communities served by only one cable operator will maintain unreasonable control over the communications pipeline which broadcasters and advertisers must utilize to reach viewers.

Cable operators, if allowed total control over their competitors' signals, can be expected to utilize it to their own advantage. This is simply a recognition of economic reality. Only Congress can assure fair and equitable competition under the current realities of the marketplace.

A.N.A. believes that Congress should enact specific, permanent broadcast signal carriage rules. Failure to do so will lead to:

1). Less competition in the video marketplace;

2). Fewer information and programing options for the public;

3). Decreased effectiveness and efficiency of advertising with a resulting adverse impact on employment and the economy; and

4). Increased cost to advertisers which, eventually, will have to be passed on, directly and indirectly, to consumers.

These four concerns are related directly to the ability of cable operators without "must carry" rules to drop or to place severe economic burdens on local television stations. A.N.A. believes strongly that viewers must have reasonable access to local stations on which our advertisements are placed.

For years, A.N.A. members faced limited competitive advertising options due to a constricted video marketplace. In recent years, the launching and rapid growth of new independent television stations has fostered a more competitive marketplace. A.N.A. research has disclosed that the pressure of competitive video options in a market tends to have a moderating influence on the cost of time of all local stations. Lower advertising media costs help consumers as higher media costs often must be reflected in higher product costs.

Reasonable local cable carriage rules will ensure that the continued growth of this competitive environment is not impeded. Without these rules, as cable advertising spot sales grow, local cable operators will have an increased incentive to block out or severely burden local broadcast stations which represent competition for advertising revenues. Such anti-competitive behavior flies in the face of the goal of Congress to achieve diversity in the marketplace.

A.N.A. believes that if permanent "must carry" rules are adopted this also will go a long way to resolving many of the nettlesome cable "ownership" issues now pending in Congress. If cable is required to adhere to rules that assure an equitable and competitive marketplace, who owns cable becomes much less of a pressing issue.

In conclusion, reasonable, well-tailored, constitutional and permanent broadcast signal carriage rules for cable television systems are essential for video marketplace diversity and competition. Without "must carry" rules it is certain that broadcasters, advertisers and ultimately consumers will be the losers. A.N.A. strongly urges you to adopt permanent "must carry" legislation so that a vibrant, economically competitive marketplace for the purchase of advertising time is assured.

STATEMENT OF QVC NETWORK, INC.

QVC Network, Inc. (QVC) is a televised home shopping service which is delivered to approximately 36 million homes via cable television systems throughout the United States. QVC began in 1986.

Home Shopping Network (HSN) is a televised home shopping service which is delivered to approximately 60 million homes both as a cable service via cable systems and as an over-the-air broadcast service through the ownership of and affiliation with local UHF stations. HSN also began in 1986. HSN is the largest entity in the televised home shopping industry controlling approximately 50% of the market while QVC companies combine to make up the remainder of the industry.

S.12 as currently written would grant "must-carry" status to all of HSN's owned and affiliated local broadcast stations, setting a precedent that would (1) have severe public policy ramifications, (2) hinder consumer choice in televised home shopping and, (3) legislate a dramatic marketplace advantage to HSN over QVC and all other competitors.

QVC strongly urges the Congress not to legislate an imbalanced marketplace in the televised home shopping field, but instead to state clearly and definitively that regardless of the mode of transmission — via cable or via broadcast signal — no televised home shopping service should receive federally mandated carriage on cable systems.

I. Creating a special legislative preference for one home shopping service — HSN — is bad public policy

Bestowing "must-carry" status upon HSN's local broadcast stations is entirely inconsistent with the premises upon which local broadcasters base their "must-carry" arguments and their advocacy of the special role that local broadcasters play in our society. "Must-carry" for HSN is anti-localism, anti-diversity, and anti-public service obligation.

"Must-carry" for HSN is anti-localism

Localism is at the heart of broadcast industry arguments for "must-carry." HSN is a nationally distributed satellite feed. Its UHF stations and affiliates broadcast this feed as it is received. An insignificant amount of local programming is inserted by HSN's stations.

"Must-carry" for HSN is anti-diversity

HSN stations, in broadcasting the corporation's national satellite feed, are not providing a diversity of programming. By giving HSN "must-carry" Congress would be mandating that channel capacity which could be used to provide unique or diverse programming which consumers desire must instead be reserved for a particular home shopping service. This is among the reasons that providers of specialty programming such as Black Entertainment Television oppose "must-carry" for HSN.

"Must-carry" for HSN is anti-public interest programming

HSN's stations carry approximately 21 to 22 hours per day of sales presentations. What fills in the remaining time are brief taped messages, most of which do not remotely approach public interest programming.

HSN's Vineland, New Jersey station WHSP-TV Channel 65, can serve as a typical example.

A full-time logging of that station's broadcast day demonstrates HSN's level of commitment to localism, diversity and public interest programming. Each twenty-four hour day of virtual non-stop sales presentations is interrupted once or twice per hour for a brief message or announcement. Most days are dominated by the constant repetition of a single taped feature.

For example, the dominant feature of July 1, 1990 was the repetition 17 times of a four minute interview with a veterinarian on the subject of heartworms. Sixty-eight minutes of heartworms.

July 2, 1990: WHSP carried 1 hour and 55 minutes (115 minutes) of such programming of which 99 minutes was the repetition of a single four to five minute tape.

July 3, 1990: 96 total minutes of which 80 minutes was the repetition of a single four minute tape.

July 4, 1990: 108 total minutes of which 88 minutes was the repetition of a single four minute tape.

July 5, 1990: 103 total minutes of which 92 minutes was the repetition of a single four minute tape.

July 6, 1990: 99 total minutes of which 80 minutes was the repetition of a single four minute tape.

In each instance, less that two hours out of a 24 hour broadcast day was something other than sales presentations — over 22 hours per day of retransmission of HSN's national satellite feed.

Should Congress leave it to the FCC to deal with the HSN public interest issue?

On December 14, 1990 the FCC rubber-stamped the renewals of two of HSN's broadcast stations in spite of a Petition to Deny filed by the Media Access Project on behalf of the Office of Communications of the United Church of Christ, Action for Children's Television and others (Exhibit 1).

HSN's lack of commitment to public interest programming has been blessed by the FCC through renewal. If Congress grants HSN "must-carry," it, too, is signalling its approval.

"Must-carry" for HSN is anti-children's programming

Last year, Congress passed the Children's Television Act of 1990. (Exhibit 2) The language of the statut and the legislative history make it clear that the Act requires that local broadcasters carrying home shopping meet certain obligations under the legislation. Failure to comply results in penalties as severe as non-renewal of the broadcaster's license. (See, e.g., Exhibit 3, an excerpt from the House floor debate on the legislation)

HSN stations carry little, if any, children's "programming." In fact, during children's viewing hours, HSN mostly continues its normal practice of virtual non-stop sales presentations. Over-commercialization — constant sales presentations — is exactly what the Children's Television Act was designed to prevent broadcasters from doing. HSN's "program content" is commercials not children's programming.

Should Congress leave the matter of HSN's record on children's programming to the FCC?

As stated previously, on December 14, 1990, after Congress had passed the Children's Television Act of 1990, the FCC renewed the two HSN broadcast licenses mentioned above in spite of the aforementioned objections by Action for Children's Television and others.

Giving the back of its hand to Congressional intent and concern in the area of children's programming, HSN's comments filed with the FCC in that agency's ongoing children's television rulemaking state that "the commission should make clear that its commercial limits do not apply to home shopping programming carried by stations which have a home shopping format" and that the Commission should "clarify that children's educational and instructional programs may be 30- or 60-seconds long." (Exhibits 4 and 5)

HSN's behavior in the area of children's programming has also been blessed by the FCC through renewal. If Congress grants HSN "must-carry," it, too, is signalling its approval.

Valuable Spectrum is Being Over-Commercialized

"Must-carry" for HSN will signal Congressional encouragement of, if not a Congressional mandate to, real local broadcasters to flee from the obligations of public service, diversity and localism and convert to virtual non-stop sales presentations. This growing proliferation of over-commercialization of the broadcast spectrum is a major public policy concern in this time of spectrum scarcity. The problem of spectrum scarcity is so severe as to warrant pending legislation to convert spectrum reserved for military use to commercial use. (H.R.531)(S.218) (Exhibits 6 and 7)

The proliferation of over-the-air broadcasts of shopping, program-length commercials and informercials is evidenced by last summer's announcement of the linking of UHF stations to create an informercial network and current efforts to form a low power television shopping network. (Exhibit 8)

First Amendment Considerations

From a First Amendment viewpoint, this situation should be considered as a "degree of commerciality" issue rather than as a "content" issue. The Supreme Court has stated that "commercial speech" is not entitled to the same degree of First Amendment protection as opinion. Moreover, last year's cable bills — and this year's proposals — have already established a precedent for granting different levels of must-carry preference based upon degree of commerciality. The highest levels of preference were proposed to be granted to C-SPAN and non-commercial broadcast stations. A lower level of "must-carry" preference was proposed for commercial broadcast stations. Furthermore, the last year's bills excluded "television translator stations and other passive repeaters" from the definition of "qualified commercial stations." The UHF stations that retransmit HSN programming serve essentially the same function as those excluded categories, although they are not labeled as such.

II. "Must-carry" for HSN is anti-consumer choice and will legislate the marketplace

Cable operators select programming choices based on what consumers in each cable service area desire. By granting "must-carry" to HSN the Congress would not only be mandating that a televised home shopping service appear on a cable system's basic tier but also which televised home shopping service among several competitors gets that government mandated channel. This will make it difficult, if not impossible, for QVC and others to compete for carriage on that system, particularly on the basic tier. Consumers may have to purchase additional tiers of service to receive QVC, a service which costs the cable operator nothing to provide. Which shopping channel is carried by each cable operator is a marketplace decision which Congress should not make for consumers.

III. The Big Lie: HSN Needs "Must-Carry" to Overcome QVC's Vertical Integration

The principal reason which HSN offers for needing "must-carry" is that QVC is vertically integrated due to the fact that several cable operators own stock in QVC resulting in discriminatory carriage of QVC over HSN. Several cable companies do own stock in QVC, but no evidence of such discrimination has been offered by HSN. (Exhibit 9)

Fact: Both HSN and QVC are Vertically Integrated.

Fact: HSN offered stock options to cable companies as far back as 1986, stating in its prospectus that "for the purpose of securing and increasing viewership of the Company's HSN I program" HSN would offer stock options to a cable operator which (1) executes a special affiliation agreement (the "Special Affiliation Agreement") committing the cable operator to carry HSN for three years, and (2) agrees to cooperate in certain additional promotional and marketing activities supplied by or paid for by the Company.

Vertical integration is clearly not a factor. This issue involves two companies competing for carriage on cable systems throughout the country. QVC advocates that Congress not skew the marketplace by legislating mandated carriage for HSN, but instead allow open competition to continue. HSN claims discrimination whenever a cable operator makes a qualitative decision to carry QVC, remaining silent when a cable operator's choice is HSN.

Moreover, discrimination solely on the basis of ownership or affiliation is anti-competitive under existing law and is addressed in the pending cable legislation.

HSN's other defense of HSN "must-carry" is that the FCC granted HSN broadcast licenses and it is up to the FCC to determine whether or not HSN's offerings are anti-diversity, anti-localism, anti-public service obligation and lacking in its commitment to children's programming needs. But there is a track record established and Congress has an obligation to step in and protect the public interest.

As stated earlier, the FCC had an opportunity to do just that last December after these issues had been raised by the Congress both in cable reregulation legislation and children's television legislation. Instead, the FCC rubber-stamped HSN's renewals of two of their UHF stations. Such a signal further encourages local broadcasters to abandon attempts to provide diverse offerings, local programming and public interest programming for the apparent "permanent" license which HSN's national satellite feed of televised home shopping seems to ensure. This is a particularly important policy issue in light of the extraordinary number of broadcast licenses which will be up for renewal in the near future. It is further evidence that Congress should not enact a policy — "must-carry" for HSN — which encourages such abandonment of traditional local broadcasting and causes a proliferation of shopping services and program-length commercials delivered over scarce local broadcast spectrum.

Conclusion

From a public policy perspective, from a consumer choice perspective and on the grounds of basic fairness, it is absolutely crucial that regardless of mode of delivery, home-shopping programmers continue to compete on a level playing field in the marketplace rather than having Congress legislatively favor one home-shopping programmer over the others. Moreover, from both the First Amendment viewpoint and a public policy viewpoint, cable operators should not be restrained from exercising their editorial discretion and right of qualitative evaluation in determining which home-shopping programs consumers would prefer to receive.

The only way to ensure this result is for Congress to adopt language which makes it clear that any "must-carry" provision will not apply to those broadcasters such as HSN who have chosen to use the public trust granted in their broadcast licenses predominantly for sales presentations and program-length commercials.

Statement of Sharon Ingraham
National Chair
The National Federation of Local Cable Programmers
April 5, 1991

The National Federation of Local Cable Programmers (NFLCP) is pleased to comment on Senate Bill S. 12, "The Cable Television Consumer Protection Act of 1991."

The NFLCP is a national membership organization comprised of more than twelve hundred organizations and individuals in more than 700 communities. The NFLCP's mission is to promote the development of local programming and to protect and increase freedom of expression, diversity of ideas and community communications through the medium of cable television. Our members include volunteer access producers, access center managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others interested in local cable programming around the country.

The NFLCP supports the underlying national communications policies upon which S. 12 is founded: localism, diversity of programming and information, competition and the appropriate roles and responsibilities of federal, state and local governments in overseeing multichannel video providers. However, we believe that the bill fails to include critical provisions which apply these policies to the protection and support of Public, Educational and Government (PEG) access. Moreover, in its attempt to assure cable carriage for public television stations, S. 12 includes provisions that threaten PEG access and that will likely disrupt many franchise agreements which cities have negotiated with cable operators across the country.

PEG access channels are cable channels programmed by the community that is served by the cable system. These channels:

- fulfill compelling government interests in promoting diversity and localism;
- serve diverse community needs in communications;

- provide cable subscribers with more original programming each week than the four broadcast networks provide in a year;
- generally cost cable subscribers less each month than they pay for a single issue of their daily newspaper;
- provide valuable in-kind services to the community; and
- exemplify the best in public/private partnerships to meet community needs.

This Committee has already recognized and endorsed the crucial role played by PEG access when it stated in 1990:

> Leased access and public access programming uniquely allow individuals and groups to communicate their messages to the general public. Educational access allows local schools to supplement classroom learning and to reach out to teach those who are beyond school age or unable to attend classes. The governmental channel allows for local "mini-C-SPAN", thus contributing to an informed electorate, essential to the proper functioning of government. These governmental interests in a free market of ideas and an informed and well-educated citizenry certainly qualify as sufficiently important to pass the first hurdle of the O'Brien incidental burden test.
>
> The regulations can also readily meet the second criterion of being narrowly tailored. They are content-neutral and should specify only a reasonable amount of channel capacity for access by other parties.... For example, an allocation of at least three [PEG] channels on most systems would certainly appear reasonable: 1/

Subsequently, the House of Representative's Committee on Energy and Commerce similarly reinforced the principle that PEG channels serve a substantial and compelling government interest in diversity, a free market of ideas and an informed and well-educated citizenry by declaring:

1/ Report of the Senate Committee on Commerce, Science and Transportation on S.1880, Report 101-381, July 10, 1990, p. 46.

> The Committee believes that PEG access programming is an important complement to local commercial and noncommercial broadcasting to ensure that the government's compelling interests in fostering diversity and localism, providing educational and informational programming, and promoting the basic, underlying values of the First Amendment, are advanced by cable television. It has been demonstrated that where PEG channels exist, these interests have been well served.
>
> *** Because of the interests served by PEG channels, the Committee believes that it is appropriate that such channels be available to all cable subscribers on the basic service tier and at the lowest reasonable rate. 2/

However, experience since the 1984 Cable Act went into effect has shown that the intent of Congress to promote PEG access has been constantly at risk from renegotiation of franchises, transfer of ownership, shrinking local budgets and noncompliance with franchise agreements. The NFLCP offers the following recommendations to secure and implement the public's interest in local programming:

1) that all cable franchises be required to have channels dedicated for public, educational and governmental use;

2) that cities can freely negotiate sufficient support for PEG access operations to realize their benefits to the community;

3) that neither local governments nor access management entities may exercise editorial control over access, nor will they be held liable for access program content; and

4) that PEG access requirements be applied to non-cable, multichannel video delivery systems.

In addition, the NFLCP opposes the proposed section 615(d) which would allow cable operators to place public TV signals on PEG channels "not in use for their designated purposes." This language (1) makes no reference to the mechanisms already in place (at

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2/ Report of the House Committee on Energy and Commerce on H.R. 5267, Report 101-682, September 6, 1990, p. 80-81.

Section 611(d) of the 1984 Cable Act) that mandate a locally controlled procedure for use of unused PEG channels; (2) does not specify what "not in use for their designated purposes" means; and (3) does not indicate who is authorized to make such a determination. At the same time, this scheme will not protect carriage for public television stations, since the 1984 Cable Act directs that any use of PEG channel capacity for other purposes must be accompanied by rules through which the community can reclaim them for their original purpose as the need develops. As such, the proposed section threatens community access, invites litigation over its meaning and execution, and yet may not give public television stations the protection they believe they have secured. The NFLCP agrees that it is important to protect public television, but PEG access serves vastly different community needs that should not be endangered or impaired.

Congress should take at least the steps discussed hereafter to resolve current Cable Act problems and to move toward an environment which will permit citizens to reap the fullest public interest benefits from the broadband networks of the future.

ALL CABLE FRANCHISES SHOULD HAVE CHANNELS DEDICATED FOR PUBLIC, EDUCATIONAL AND GOVERNMENTAL USE

One of the cardinal precepts in our national communications policy is the encouragement of local, original programming for the benefit of our citizens. As the Office of Technology Assessment stated in a 1990 report: "Government policy to encourage creation and development of local community-based information has a history going back as far as the early postal service." 3/ Congress, the Federal Communications Commission and the courts have repeatedly stated that there are substantial governmental and First Amendment interests in promoting a diversity of the views provided through multiple technology media.

3/ Office of Technology Assessment, "Critical Connections: Communication for the Future," p. 192.

Today, only PEG channels are providing the public service programming that policy makers intended. 4/ Dr. Jim Davis, Executive Director, Oregon State Council of Senior Citizens, recalled his experience with public service programming on broadcast television and PEG access:

> I remember all too well the startling move to deregulate the television industry by the FCC in 1985. Included in FCC initiatives affecting local stations - which was met with surprisingly little opposition from the public - were the elimination of the requirements for informational and locally produced programming, ascertainment of community needs and public access to programming logs. Coincidentally, a senior-oriented program, "Senior Perspectives," I had hosted and produced for nine and a half years on a Eugene commercial television station was cancelled within weeks of the FCC action, along with other community service shows at the station.... The one comforting factor in these alarming actions was that citizens had an increasingly open access to cable television through Public, Educational and Government Access (PEG) channels. PEG channels continue to provide community-oriented, grassroots programming on local activities, issues and events. The senior community has been provided with a wide array of fine cable programming on PEG channels including the Oregon State Council of Senior Citizen's award winning "Age Wise," led by Tom Taylor and produced completely by local seniors. (Senior News Monthly, September, 1990)

Seniors are only one of many community interests across the country which have adopted PEG access and are vigorously involved in local communications. Others include:

- CHICAGO, ILLINOIS - Project LEAP, a non-partisan election watchdog organization, used the interactive, call-in text channel on the Chicago Access Network to recruit election judges. The message drew more responses than any of the 32 Chicago radio and TV stations and other neighborhood media outlets used.

4/ Broadcasters have been providing less and less news and public affairs programming. A 1989 study published by Essential Information, "Shortchanging the Viewers: Broadcasters' Neglect of Public Interest Programming," found a 51 percent decrease since 1979 in the average percentage of issue-oriented public affairs programming between 6 a.m. and midnight on commercial television in the 50 television markets studied.

- SOMERVILLE, MASSACHUSETTS - The Deaf Media Collaborative produced a two hour international teleconference on deafness-related issues for hearing impaired viewers. The entire program was signed and carried in 15 communities on the public access channels.
- PORTLAND, OREGON - The Good Samaritan Hospital and Medical Center's program, "HealthVisions," generates up to 100 phone calls after each episode requesting information.
- PALATINE, ILLINOIS; COLUMBUS, OHIO AND TUCSON, ARIZONA - Access centers in these communities have people with mental retardation and developmental challenges creating programming through a special video training curriculum, Project VITAL.
- VANCOUVER, WASHINGTON - PEG access provided 14,500 hours of programming in 1989.
- BUCKS COUNTY, PENNSYLVANIA - The League of Women Voters has been producing programs since 1983 on subjects such as the environment, social and women's issues, access to health care, housing and the homeless and hazardous waste.

PEG programming is being watched. The National Clearinghouse for Community Cable Viewership Research at Western Michigan University correlated viewing patterns in 78 cable markets with nearly 2.7 million subscribers. That study shows that close to 40% of cable subscribers are tuning in to government meetings, more than 37% watch local arts and entertainment programs, 36% view educational programs, 35% watch sports and 31% look to PEG access for health and wellness information.

Another survey conducted in Brooklyn Park, Minnesota, showed that 32% of the subscribers watched the access channel in 1989. Furthermore, the survey showed that the access channel was preferred over Country Music Television, C-SPAN, C-SPAN II, VH-1, FNN, The Nashville Network, The Travel Channel, The Learning Channel, Bravo, VISN, BET and Univision. Subscribers also stated that they would be willing to see a higher portion of their cable bill dedicated to PEG access.

In Boston, Massachusetts, a 1989 survey of cable subscribers revealed that 45% had watched three or more access programs in the past month, 47% had watched one or more programs in the past week and 11% had seen the local access news program during the past week.

Subscribers clearly value PEG programming where it is available. However, the data in the 1990 "Television and Cable Factbook" reveal some alarming information. Of the 9600 cable systems in the country only 16.5 percent have a public access channel, 12.9 percent have an educational access channel and 10.7 percent have a government access channel. The carriage percentage for public and educational access have actually decreased since 1988. PEG access channel carriage is minuscule compared to nonlocal, basic cable services such as MTV, WTBS and Lifetime which have carriage rates in excess of 90 percent. 5/

Home shopping channels typify the lack of balance that has developed between the public's interest and commercial interests. For example, QVC Network, owned by several MSOs, is delivered to 67% of all cable subscribers. QVC pays a five percent commission on all sales to cable operators and provides up to $2.00 per subscriber per year to operators for carriage. Because of these carriage incentives viewers are, thus, four times more likely to have the opportunity to buy plastic widgets and "diamonoids" than to see local, noncommercial public service programming.

Nevertheless, PEG access channels have emerged as the pre-eminent local programming service in those communities which have had the foresight to require them in their cable franchises. The NFLCP estimates that PEG access channels provide 15,000 hours a week of local programming. "Variety" and "Broadcasting" have reported that the national broadcast television networks, ABC, CBS, NBC and PBS have produced only 14,408 hours of original programming in an entire year at a cost of more than $2 billion.

In light of the level and quality of service, community interest and value to subscribers of PEG programming, the NFLCP strongly supports this Committee's 1990

5/ See Table XIII of the FCC's "Report to Congress On Competition, Rate Regulation and Commission's Policies Relating to the Provisions of Cable Television Services," July 1990.

finding that "an allocation of at least three [PEG] channels on most systems would certainly appear reasonable." Questions often arise, however, concerning the channel capacity to accommodate PEG channels and the costs of supporting PEG. The FCC's 1990 report to Congress on cable television (cited in footnote 5 above) shows adequate excess channel capacity from those operators surveyed (Table 6). A February 11, 1991 article in "Cablevision," stated (on pages 24 and 25) that, "more than 50% of nearly 400 operators surveyed had the capacity to add three or more services," and that, "of the systems with more than 36 channels, only 39.6 percent are filled to capacity." The most frequent reason for not adding services was the influence exerted by the parent MSO. "Under growing pressure to increase free cash flow so that the parent MSO can pare debt, most systems seem reluctant to burden their balance sheets with these extra costs."

As for the costs of PEG access, the Ohio Chapter of the NFLCP discovered that it cost the average Ohio cable subscriber only $2.34 per year or less than 20 cents per month for which the subscriber received 1284 hours of original local PEG access programming. These figures translate into an average "cost" of one hour of PEG programming in Ohio of $133.98. "The Wall Street Journal" reported that the cable industry pays $700,000 for an hour of original national programming (December 17, 1990).

As the foregoing demonstrates, mandatory PEG carriage is neither onerous nor burdensome.

THAT CITIES SHOULD BE ABLE TO FREELY NEGOTIATE SUFFICIENT SUPPORT FOR PEG ACCESS OPERATIONS TO REALIZE THEIR BENEFITS TO THE COMMUNITY

Many communities are finding that the franchise fee provisions of the Cable Act make it difficult to ensure adequate support for access in new or renewal franchises. Soon after rate deregulation went into effect, "The Journal of Film and Video" reported: 6/

> Due to lobbying on the part of franchise holders, regulations which required cable companies to offer sizable access services to their subscribers have been modified in recent years to favor cable company profitability and downplay access. Communities are now being told that the high costs of operating access channels is a burden that cable companies cannot bear.

Yet, despite the normally minimal cost described above, operators argue that any funding they provide for access must be deducted from the franchise fee. This often forces cities that wish to provide access for their community to take from the franchise fee to fund access needs. This arrangement needlessly pits a community's access needs against the city's interest in collecting a franchise fee for the use of the public rights of way. If a city wishes to negotiate to provide access support, it should be able to do so without interfering with the franchise fee it may legitimately collect.

In most communities, franchise fees cannot adequately support both a good enforcement program and an active PEG access program. Because the Cable Act does not earmark franchise fees, there is a serious danger that access will be starved in the future (even in cities where municipal funds are dedicated to access support) unless the Cable Act is changed.

6/ Betsy McLane, ed., "Community Cable Access Television: Use It or Lose It," Journal of Film and Video, Vol. 39, No. 3, Summer, 1987, p. 4. The Journal of Film and Video is published by the University Film and Video Association which focuses on the problems and substance in teaching in the fields of film and video production, history, theory, criticism and aesthetics.

Recent economic conditions have caused states such as Vermont and Massachusetts to consider bills that would drastically alter the funding of PEG access. In Massachusetts, 25 communities would lose their funding resources entirely and continued funding in more than 200 other communities would be in doubt.

"The NonProfit Times" reported other cases of PEG access funding difficulties (August 1990). "In Nashville, deregulation of funds cost the station 55% of the funds included in its 1990-91 budget." Nashville access has recently been completely defunded. In Sacramento, California a law suit by a second cable operator caused the funding for Access Sacramento to be frozen at the 1987 level instead of increasing in proportion to the subscriber growth rate as originally negotiated.

In Austin, Texas the cable operator approached the City just two weeks after rate deregulation in 1986 with a 77 point request for franchise modification under the Cable Act. The cable operator sought to eliminate all operating funds for access and to cut back the system's PEG access channels from eight to four, leaving only one for public use. The company went so far as to take out full page ads in the local newspaper to promote its case to the public. A retired Federal judge, brought in to hear testimony and issue an initial opinion, rejected all of the company's claims. It cost the city and the nonprofit access corporation $800,000 and months of work to fend off the unsuccessful attack.

The cable operator in St. Paul, Minnesota has failed to provide $230,000 worth of equipment and eight of the 10 full-time staff that it promised in its franchise agreement. The company has asked to be excused from all of its unperformed public service commitments. Failure to comply with voluntary franchise provisions have been found in community after community.

PEG access offers substantial value to the community. Regardless of the amount of access funding or the difficulties in securing and maintaining it, the value of access services far exceeds the financial support from cities and cable companies. For example, the Tucson Community Cable Corporation, a membership organization of nearly 8,000 individuals and organizations, provides all of its services (training, equipment use and cablecasting) free of charge. In its 1989 annual report this access corporation has computed the dollar value to the community at $10.2 million, which is more than 12 times Tucson's budget of approximately $800,000. Access Sacramento, another nonprofit, estimated the community value of its services at $4.5 million -- ten times its budget. (Annual Report 1990)

TO THE EXTENT THAT LOCAL GOVERNMENT OR ACCESS MANAGEMENT ENTITIES ARE NOT EXERCISING EDITORIAL CONTROL OVER ACCESS, THEY SHOULD NOT BE HELD LIABLE FOR PROGRAM CONTENT

In 1984, cable operators were given clear freedom from liability for program content of material appearing on the PEG channels. Often, however, an independent organization or the City itself manages these channels. While neither may exert editorial control over public access programming, both have faced threats of legal action for the content of programming for which they are not responsible.

This anomaly has caused cutbacks in community service. Two recent examples are informative. The City Council in Spokane, Washington eliminated the requirement for public access in its franchise renewal so as to not embroil the city in possible public access litigation and First Amendment issues. Public access had been part of the cable service for 15 years. The City Council in St. Petersburg, Florida chose not to have a public access channel as part of its recent franchise renewal for similar reasons. However, it did elect to require a government access channel.

The NFLCP urges Congress to clarify the present situation so that liability clearly rests with the responsible party: the program producer or local program sponsor. Proposed section 628 does not adequately address the potential program content liability for cities and access management entities. And so we join with the National League of Cities and U.S. Conference of Mayors in urging Congress to extend the exemption from content liability now enjoyed only by cable operators to cities, and we believe that it needs to be applied to access management entities for the same reason.

PEG ACCESS REQUIREMENTS SHOULD BE APPLIED TO NON-CABLE, MULTICHANNEL VIDEO DELIVERY SYSTEMS

Last year's House Bill H.R. 5267, "The Cable Television Consumer Protection and Competition Act of 1990," section 17(a)(4), would have extended the public service use requirements to direct broadcast satellite systems not regulated as a common carrier under the Communications Act. The FCC would have been empowered, to "require, as a condition of any initial authorization, or renewal thereof, for direct broadcast satellite service providing video programming, that the provider of such service reserve not less than 4 percent or more than 7 percent of the channel capacity of such service exclusively for noncommercial public service use."

The NFLCP applauds this attempt by the House to apply the national communications policy goals of localism and diversity to potential multichannel video providers. However, the NFLCP suggests that Congress extend public service use requirements to multipoint, multichannel distribution systems and common carriers providing video programming, as well as to direct broadcast satellite systems.

OTHER ISSUES AFFECTING THE VIABILITY OF PEG ACCESS

In addition to the foregoing issues, which are of paramount concern, the NFLCP believes the following also deserve attention:

1. S. 12 fails to ensure that access is included as a part of the basic service provided by cable television. Access channels should be included as part of the lowest cost, basic service tier.

2. Section 611 should be clarified. We think it is a good idea to have channels for public, educational and government access. It should be unlawful, however, to provide for only educational or only government access, and exclude members of the public. It is flawed policy to reserve access for select groups.

3. We join with consumer groups, cities and many in Congress who believe that there needs to be a provision for the regulation of basic cable rates; access channels, no less than local broadcast

stations and some of cable's important informational programming, should be available to everyone in the community at a reasonable cost.

4. Congress should amend sections 611 and 622 to ensure that cable operators can be required to provide facilities, equipment and operating funds to support access, and to make it clear that any such support is not to be counted as part of the franchise fee.

5. Congress should strengthen the position of local franchise authorities to enforce franchise provisions, by imposing penalties and allowing recovery of attorney's fees in enforcement actions. Just as importantly, Congress should encourage citizen enforcement by empowering individuals to enforce Cable Act provisions and to recover attorney's fees if the challenge is successful.

6. The modification provisions of the Cable Act should be altered to discourage actions which are designed merely to delay franchise compliance. PEG access provisions for facilities, channels, equipment and funding should be exempt from attempts to reduce access support during modification.

7. Congress should modify section 611 to make it clear that cities may require an operator to provide access services through an independent nonprofit organization.

CONCLUSION

Noted legal scholar, Monroe E. Price, Dean, Benjamin N. Cardozo School of Law, best summarizes the philosophical foundation for the NFLCP's proposals.

> The victory of Tom Paine is being corporatized.... The soapbox is being replaced by the mall. We may be creating a plastic freedom in which the logic of the first amendment becomes the enemy of the realization of a multitude of speech.
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> • • •
>
> The danger is in the loss of flexibility, a loss in the ability of society, through government, to fashion a structure of telecommunications that magnifies the possibility of speech. The debate is between power and access. The debate asks whether, in the common metaphor of the

> bazaar, government has an interest in assuring that a marketplace exists -- in helping to construct a marketplace -- so that the marketplace of ideas can flourish. (Cardozo Arts & Entertainment Law Journal, Volume 8, Summer, 1990, pp. 226 and 228)

The NFLCP believes that Congress, in partnership with local communities, has the primary role in cultivating such a marketplace. Whenever government opens its public streets and rights-of-way for the permanent installation of communications networks which provide multiple channels of video and other information for private commercial purposes, that government has fiduciary and constitutional obligations to ensure that such channels are not monopolized by private interests. PEG channels are the best means to preserve the opportunities for all citizens to communicate over such networks and cable systems.

In order to implement these recommendations we are submitting the attached language in response to the Chairman's request at the March 14 hearings.

STATEMENT OF
THE U. S. CONFERENCE OF MAYORS,
THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES,
AND THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

TO THE UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
SUBCOMMITTEE ON COMMUNICATIONS

CONCERNING

S. 12,
THE "CABLE TELEVISION CONSUMER PROTECTION ACT OF 1991"

March 14, 1991

Mr. Chairman and Members of the Subcommittee, the U.S. Conference of Mayors ("Conference"), the National League of Cities ("League"), the National Association of Counties, and the National Association of Telecommunications Officers and Advisors, thank you for the opportunity to submit this statement as part of the hearing record on S. 12, the "Cable Television Consumer Protection Act of 1991." This Statement supplements the Testimony provided by the Honorable Sharpe James, Mayor of the City of Newark, who testified on behalf of the League and Conference before this Subcommittee.

Outlined below are suggested amendments to S. 12. This Statement also addresses a question Senator Conrad Burns (R-Mont.) asked Mayor James regarding whether local governments would oppose a provision requiring that they grant multiple franchises.

I. COMMENTS ON THE BILL

A. Section 2: Findings

Local governments recommend deleting the language in Section 2(2) that attributes to "franchising requirements" the lack of local competition for video programming services. Local franchising requirements are not the reason cable subscribers lack the opportunity to select between competing cable systems, nor can this oft-heard assertion be supported by any credible evidence.

B. Section 4: Definitions

1. "Available to a Household": The term "available to a household" or "available to a home" in Section 4(c) should be expanded to include a household that is actively and currently sought as a subscriber or customer by a multichannel video programming distributor and which is capable of receiving the service offered by the multichannel video programming distributor.

2. "Cable Community" Definition: The term "cable community" in Section 4(d) should be amended to clarify that it includes the geographical area in which a cable operator has been granted a franchise to provide cable service. The present definition only includes homes where the cable operator actually provides cable service. The definition is used in Section 5 of S. 12 to determine the geographical area in which "effective competition" is measured. The proposed amendment is needed to ensure that "effective competition" is present throughout a franchise area. Otherwise, competitors may meet the standard by providing cable service only to homes in portions of the franchise area with high population densities or in wealthier areas.

C. Section 5: Regulation of Cable Rates

Local governments believe that the rate provisions in S. 12 may help alleviate current rate concerns. Several revisions and clarifications must be made in section 5, however, to ensure that consumers are adequately protected.

First, in addition to the installation and rental of equipment used to receive cable service, proposed Sections 623(a), 623(b)(1), 623(e)(2) and 623(f) should be amended to subject the sale of cable equipment to rate regulation. Otherwise, cable operators could undermine the intent of regulating the rental of cable equipment by selling such equipment at monopolistic prices.

Second, Section 623(b)(1) should be amended to define the basic cable service tier to include all programming services, except non-advertiser supported programming services offered on a per program or per channel basis. At a minimum, the provision should be amended to require that if fewer than 30 percent of all customers to a cable system subscribe only to basic cable service, franchising authorities and the FCC shall ensure that the rates are reasonable for the most popular tier of service. Such amendments are necessary to ensure that the majority, rather than a minority, of cable subscribers pay reasonable rates for the tier of cable service that they receive.

Moreover, Section 623(b)(1) should be amended to clarify that franchising authorities may have the right to ensure that basic rates are reasonable.

Third, proposed Section 623(b)(2)(A) should be amended so that franchising authorities are allowed to regulate rates if they certify in writing that they will regulate rates consistent with sections 623(b)(2)(A)(i) and 623(b)(2)(A)(ii). Franchising authorities should not be subject to the cumbersome certification process in S. 12. It is not in the public interest because it would delay the ability of local franchising authorities to protect the consumer.

Moreover, Section 623(b)(2)(A)(i) should be amended to require that local rate standards "not be inconsistent with" Commission standards, rather than to require that such standards "conform" to the FCC's standards. Similarly, Section 623(b)(2)(B) should be amended to allow revocation only if local and state standards are "inconsistent" with the standards in subparagraph (A(i) or (ii) rather than if "not in conformance" with such standards. There is precedent for such a flexible standard in the Cable Communications Policy Act of 1984 ("Cable Act"); Section 632 of the Cable Act, for example, allows franchising authorities to enact consumer protection standards "not inconsistent with this title." No provisions in the Cable Act seem to require that local regulations "conform" to FCC rules. It would be impractical to require that local rate regulations and laws always "conform" to FCC policies in all respects and at all times, given that such a standard might require franchising authorities to amend their regulatory plans when, for example, the FCC issued a letter ruling or changed its rules in some fashion.

Finally, Section 623(b)(2)(A)(ii) should be amended to state that franchising authorities must provide "at least" the level of protection required by the FCC. Franchising authorities should have the flexibility to protect consumers from rate abuses that may not be adequately addressed by the FCC's rules.

Fourth, third parties should not have an absolute right to trigger full-scale review of local regulation as provided in proposed Section 623(b)(2)(B). Actions by third parties would further complicate and make more costly the regulation of cable systems. The objectives underlying Section 623(b)(2)(B) can be accomplished more efficiently if S. 12 is amended to provide that the FCC has the discretionary authority, after receiving third-party complaints, to institute review of local rate regulations.

In addition, Section 623(b)(2)(B) of S. 12 implies that revocation of a franchising authority's right to regulate rates may be permanent. Revocation should not be permanent; the provision should be amended to provide that a franchising authority has the right to seek restoration of its authority six months after revocation.

Fifth, proposed Section 623(b)(4), along with Section 623(c)(2)(a), should be amended to require the FCC to update periodically its rate standards. Otherwise the FCC may fail to update its rate standards to reflect contemporary conditions. Such a concern is valid given that the FCC has failed to update its 20-year old technical standards, despite developments in cable technology.

Sixth, proposed Section 623(c)(1), along with Section 623(c)(2)(B), should be deleted. Local franchising authorities should have the right to regulate all rates, except the rates for non-advertiser supported programming offered on a per program or per channel basis. The FCC should be limited to establishing a federal rate regulatory framework and reviewing appeals of local rate decisions, as already provided for in 623(b), 623(c)(2) and 623(c)(3).

Seventh, along with the other public interest factors delineated in proposed Section 623(c)(3), S. 12 should be amended to include a provision requiring the FCC to consider local factors in determining whether a rate increase is unreasonable. A rate increase might be considered "reasonable" from the standpoint of the few factors now listed in Section 623(c)(3) -- but wholly unreasonable in light of local conditions surrounding such an increase.

Eighth, the "effective competition" standard in proposed Section 623(d) should be amended to require that the competing multichannel video programming distributor make its programming service available to at least 80 percent of the households and actually serve 30 percent of such households. S. 12 only requires such competitor to offer service to a majority of the cable community and actually serve 15 percent. This standard is inadequate to protect most consumers from rate abuses. Under this definition, cable operators could be deemed subject to effective competition even though they mainly provide service in different parts of a franchise area. For example, if both have the capacity to serve only 52 percent of the franchise area, it is possible that they will actually compete in only four percent of the franchise area -- thus severely limiting their incentive to offer competitive rates.

Moreover, S. 12 should be amended to ensure that the "effective competition" standard is not subject to revision by the FCC. The bill should make it clear that a cable operator is deemed subject to "effective competition" only if it meets the standard outlined in Section 623(d) of the bill. Under the bill, the FCC apparently could define other situations where "effective competition" exists because "effective competition" is simply "presumed" to exist if the bill standard is met. Given that the FCC's current "effective competition" standard is largely responsible for the lack of restraint in setting rates and the lack of review of cable rate increases in the United States since rate deregulation, local governments do not believe the FCC should have the authority to revise the standard. The standard should be set by Congress.

Finally, the proposed Section 623(e)(2) should be amended to include all persons with disabilities, not just the hearing-impaired. Franchising authorities also should be able to regulate the equipment which facilitates the receipt of cable service by, among others, the blind and the ambulatory-impaired.

D. Section 6: Nondiscrimination With Respect to Video Programming

Local governments believe the provisions in Section 6 of S. 12 would help prevent discrimination by cable programmers against unaffiliated cable systems and other alternative multichannel video programmers, and by cable operators against unaffiliated programmers. However, local governments are concerned about provisions that could be interpreted to allow cable operators to enter into exclusive programming contracts -- such as proposed Section 641(2) that prohibits a cable operator from "coercing" a video programmer into providing exclusive carriage rights. In order to ensure that competitors have access to popular programming necessary to compete, S. 12 should include a provision prohibiting exclusive programming contracts unless the programming is offered to competitors to the cable operator on nondiscriminatory terms.

E. Section 7: Leased Commercial Access

Local governments support the provisions in S. 12 that would allow the FCC to ensure that the terms of leased commercial access under Section 612 of the Cable Act are fair and reasonable. In addition to these changes, S. 12 should provide for the deletion of Section 612(h) in the existing Cable Act. Local governments believe it would be unconstitutional for a franchising authority -- on its own, absent a court proceeding -- to prohibit the carriage of leased access programming it deems obscene or indecent. The appropriate method for a local government to attempt to remove such programming would be to seek appropriate relief from a court.

F. Section 10: Customer Service

Local governments support the customer service provisions in Section 10, which would allow franchising authorities by ordinance or franchise agreement to establish customer service standards that exceed those established by the FCC. However, local governments recommend several clarifying amendments.

First, to clarify that franchising authorities have the right to establish customer service standards by ordinance (i.e., local law) and franchise agreement, Section 10 should be amended to strike from Section 632(d)(2)(A) the following language -- "in effect on the date of enactment of this subsection." This limitation, contrary to the intent of S. 12, implies that franchising authorities cannot by franchise agreement or local law establish customer service standards exceeding the FCC's standards once S. 12 is enacted. Moreover, a conforming amendment is necessary to Section 632(a) in the current Cable Act to clarify that franchising authorities can establish customer service standards by local ordinance; the following limiting language should be deleted: ", as part of a franchise (including a franchise renewal, subject to section 626),".

Second, the proposed Section 632(e) in section 10 of the bill should be deleted. At a minimum, the subsection should be amended to require a cable operator to establish a prima facie case that local customer service provisions are not in the public interest. The provision must be amended to protect franchising authorities from meritless claims.

G. Section 11: Franchise Renewal

The renewal amendments in S. 12 resolve several of the current concerns of franchising authorities. However, to be fully effective in promoting competition and ensuring that consumers receive quality service, S. 12 should include three critical additional amendments.

First, a provision should be added to the bill clearly authorizing municipalities to solicit competing bids for a franchise subject to renewal. If cable operators knew they would face such real competition at renewal, they would have more incentive to upgrade their performance during the life of a franchise. A franchising authority should be able to determine that a competing operator will better serve a community's cable television needs and to award the franchise to that cable operator.

Second, the judicial standard of review should be changed from "preponderance of the evidence" to "arbitrary and capricious." Such a standard would protect a cable operator from an unfair denial of renewal, yet the standard would provide appropriate deference to a franchising authority which is in the best position to consider the cable operator's qualifications.

Third, franchising authorities are not allowed to consider many relevant factors under Section 626(c)(1) of the Cable Act in determining whether to renew a franchise. A provision should be added to Section 626(c)(1) allowing a franchising authority to consider, for renewal purposes, any other factors reasonably determined by the franchising authority to be relevant to the public interest in cable service.

Fourth, S. 12 should be amended to clarify that a franchising authority has the right to consider for purposes of renewal the quality of a cable operator's service throughout the franchise term, including the service provided by its predecessors during the term.

H. Section 13: Limitations on Franchising Authority Liability

Although local governments welcome the damages immunity provisions in Section 13 of S. 12, the provision will not protect adequately franchising authorities. Section 13 should be amended to grant franchising authorities immunity in any claim challenging the right of franchising authorities to regulate a cable operator, except for claims where an individual proves discrimination on the basis of race, color, sex, age, religion, national origin or handicap. Such immunity is necessary to prevent cable operators from circumventing the First Amendment immunity protections in the bill by simply asserting claims on other grounds.

Section 13 should grant local governments protection for acts taken pursuant to all applicable law. The bill limits immunity to a franchising authority's actions "expressly authorized or required by this title." Hence, any other regulatory action a franchising authority takes pursuant to a franchise agreement, or other federal, state or local law, may not be subject to damages immunity. Such an action should be subject to damages immunity. Moreover, immunity should extend to a decision arising from the approval or disapproval of a grant, renewal, transfer or amendment of a franchise.

Finally, Section 13 should be amended by striking the provision granting cable operators the right to collect attorney's fees and legal costs. The threat of monetary damages has a chilling effect on a franchising authority's lawful exercise of its regulatory power.

I. Section 14: Minimum Technical Standards

Local governments believe that provisions in Section 14 will help ensure that consumers receive an adequate signal, because the FCC will be required to update its antiquated technical standards. However, since current problems have resulted from FCC inaction, Section 14 should be amended so that local franchising authorities have the right to impose, by ordinance or franchise agreement, signal quality standards more stringent than the FCC's standards. In addition, local regulatory authority is needed because national standards will not in all cases be adequate to provide the signal quality that cable subscribers may expect.

Finally, Section 624(e)(4) as proposed in S. 12 should be amended to require cable operators to comply with the FCC's standards within one year after they become effective.

J. Other Competitive Measures: Sections 8, 9, 12 and 15

In addition to the provisions above, S. 12 includes other provisions that would stimulate competition in the cable industry. Sections 8 and 9 of the bill include provisions which would limit horizontal concentration and vertical integration in the cable industry. Section 12 would allow the FCC to explore the possibility of requiring television manufacturers to include a switch permitting viewers to change readily among all video distribution media. Section 15 of the bill would encourage cable operators to carry local television broadcast signals. Local governments support the approach in these provisions to alleviating competitive problems in the cable industry.

However, franchising authorities are concerned with a provision in the proposed Section 615(d) in Section 15 of the bill that would allow cable operators to carry noncommercial stations on unused PEG channels without any further review. Allowing such use of PEG channels would, no doubt, chill public access. Therefore, the provision should be amended to subject such carriage to the approval of a franchising authority. Moreover, Section 615(d) should include a time limit on the period a noncommercial station can be carried on an unused PEG channel; a cable operator should be required to remove the noncommercial station from the PEG channel to another channel after that time period expires.

II. MULTIPLE FRANCHISES

Senator Burns asked during the hearing whether local governments would oppose a requirement that they grant multiple franchises.

Local governments are not opposed to multiple franchises and are willing to grant viable franchises that are clearly in the public interest. Many states, in fact, prohibit local governments from granting exclusive franchises. However, for the reasons outlined below, local governments oppose measures requiring them to grant multiple franchises. Such a requirement might harm cable consumers in cable communities where a cable operator decided on its own to attempt a second franchise that would not be viable and otherwise would not pass a municipality's public interest tests. Because the costs of failure or a buy-out of an unwise overbuild most likely will be borne by consumers, local governments should be permitted to determine the conditions under which multiple franchises should be sanctioned.

Local governments are more than willing to grant overbuild franchises where they are in the public interest.[1] Prudently planned overbuilds are desirable because they can result in the provision by the competing cable operators of better service at lower rates. Unfortunately, notwithstanding the receptivity of most local governments to competition in their areas, the number of markets in which viable overbuilds are possible is extremely limited.[2] This reality is demonstrated by the relatively few expressions of interest by cable operators in establishing competing franchises.

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[1] Local governments, in fact, are concerned with provisions in the Cable Act that limit their ability to introduce competition into local markets. Section 626 of the Cable Act, for instance, makes it difficult to deny a cable operator renewal -- with the result that the Cable Act helps perpetuate the monopoly most cable operators currently enjoy. Hence, potential cable competitors find their entry into most local cable markets barred by the infeasibility of overbuilds and the inability of franchising authorities to award an incumbent's franchise to a bidder who may better serve the public interest.

[2] "Cherry-pick" overbuilds of a limited part of a franchise area may be more successful than overbuilds in which cable operators are engaged in head-to-head competition throughout a franchise area. However, except for certain circumstances -- such as where cable service is available to all residents, cherry-pick overbuilds do not serve important public interest goals in the Cable Act, such as the provision of cable service to all, regardless of income. See Cable Act § 621(a)(3), 47 U.S.C. § 541(a)(3). Moreover, cherry-pick overbuilds could easily undermine the stability of the existing system and result in demands for changes in franchise terms, unilateral decisions not to meet franchise requirements, decreased capital investment in the existing system, or the failure of the incumbent system.

Virtually every study of overbuilds identifies market conditions, rather than actions by franchising authorities, as the reason for the small number of overbuilds. The most frequent rationale offered is that cable is a natural monopoly and is consequently unable to provide a sufficiently attractive economic return when competition is attempted. See Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1563 (5th Cir. 1984).

More significant than the relatively small number of existing overbuilds, however, is the number that have failed. Touche Ross & Co. noted in 1987 that, of the 65 areas where it found that overbuilds were authorized, almost one third were never constructed. Touche Ross & Co., Report on Overlapping Cable Franchise Study for Dade County, Florida, (October 7, 1987), p. 38 ("Dade County Study").

Examples of short-lived overbuilds include Warrensburg, Missouri where, because of the unacceptable profitability of the two systems, Warner-Amex bought out its competitor; Delaware County, Pennsylvania where Lenfest Communications bought out two competitors; Kearney, Nebraska where Cable Systems USA, which previously did not own any cable systems in the area, bought both competing systems; and a large exchange of systems between two multisystem operators, Times Mirror Co. and Storer Communications, that effectively eliminated competition in Phoenix and another Arizona community.

For these reasons, local governments oppose a requirement that they grant multiple franchises. Local franchising authorities should retain the discretion they have to deny additional franchises that are not in the long-term interests of the community because they, for example, do not impose reasonable customer service and signal quality standards to protect consumers.

WRITTEN TESTIMONY OF USA CABLESYSTEMS, INC.

SUBMITTED FOR INCLUSION IN THE RECORD OF
MARCH 14, 1991 HEARINGS ON

THE CABLE TELEVISION CONSUMER
PROTECTION ACT OF 1991 (S-12)

COMMUNICATIONS SUBCOMMITTEE OF
UNITED STATES SENATE COMMITTEE ON
COMMERCE, SCIENCE, AND TRANSPORTATION
SENATOR DANIEL K. INOUYE, CHAIRMAN

USA Cablesystems Inc. ("USA Cable") is a Delaware corporation whose three subsidiaries are the franchisees of 675 small cable systems serving rural areas in 20 states.[1] USA Cable appreciates this opportunity to submit its written testimony in connection with the proposed Cable Television Consumer Protection Act of 1991 (S-12) (the "Cable Consumer Protection Act").

I. Introduction

The Cable Consumer Protection Act would amend Section 623 of the Communications Act of 1934, as amended (the "Communications Act"),[2] to substantially reregulate cable television rates. Specifically, under revised Section 623, if a cable system was not subject to effective competition, the Federal Communications Commission ("FCC") would be authorized to regulate the system's rates for basic cable service and equipment. The proposed legislation also narrows what would constitute effective competition under Section 623.

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[1] USA Cable is a wholly-owned subsidiary of a Canadian corporation, C1 Cablesystems Inc. ("C1 Cable"), which, through five Canadian subsidiaries, operates 490 small, rural cable systems throughout seven Canadian provinces.

[2] 47 U.S.C. §543.

As detailed below, USA Cable supports the adoption of legislation that would extend rate regulation to the vast majority of large urban cable systems, which have been the source of substantial and unjustifiable rate increases since the implementation of the Cable Act. However, USA Cable submits that proposed regulatory oversight of the rates of small rural systems, like those operated by USA Cable,[3] whose rates are reasonable and effectively controlled by market forces, would create undue financial and administrative burdens on the operators of such systems, the FCC and ultimately the taxpayer.[4]

If Congress does adopt rate regulation legislation, as USA Cable supports, to curb abuses by large system operators, USA Cable urges the Commerce Committee to modify S.12 to include an exemption for small systems with fewer than 1,000 subscribers. That cutoff already applies to network program nonduplication protection under Section 76.95 of the FCC's rules,[5] as well as to certain FCC record-keeping requirements.[6] In addition, Section 76.67(f) of the FCC's rules exempts systems under 1,000 subscribers from the expense of sports-programming deletion.[7] Moreover, the U.S. Copyright Office also recognizes the unique nature of small systems with limited gross receipts by requiring only a nominal, flat semi-annual fee to be paid by such systems for copyright purposes.

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[3] The existing statutory scheme and the FCC's current rate regulation standards (47 C.F.R. §76.33) have permitted and encouraged USA Cable to provide cable television service to remote areas of the United States that would otherwise be denied the benefits of cable technology and multiple programming sources.

[4] In this connection, USA Cable strongly supports the provision of S-12 that would amend Section 613(f) of the Communications Act (47 U.S.C. §533) to require the FCC to implement rules limiting the cumulative number of subscribers a cable entity may serve, rather than the number of systems it may own, in an effort to discourage monopolization, but to encourage the development of cable in rural areas.

[5] 47 C.F.R. §76.95.

If, however, small systems are not exempted from any rate regulation legislation, USA Cable urges the Committee to retain current Section 623(e)(1) of the Communications Act,[8] which allows cable systems to raise rates even in the absence of effective competition, as now defined, if the annual increase is no more than five percent. Alternatively, increases in regulated rates of no more than a cable system's actual increased costs plus some portion of any increase in the Consumer Price Index should be permitted.

As further detailed below, operators of small rural cable systems, like USA Cable, have significantly higher construction and operational costs than do large, urban system operators, and their rates, while generally not now regulated by local authorities, are dictated by market forces. Imposition of rate regulation through the adoption of a more stringent definition of "effective competition," as specified in S.12, would have a disproportionately severe adverse impact on small cable systems unless small systems were exempt or the five percent annual allowable increase for regulated rates (or a comparable standard) were retained. Rather than guaranteeing moderate rate levels for subscribers, regulation of even minor rate increases would instead either significantly increase the costs that potentially would be passed on to subscribers, or make provision of cable service to remote rural areas economically prohibitive, contrary to the paramount public interest.

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[6] 47. C.F.R. §76.300(b).

[7] 47. C.F.R. §76.67(f).

[8] 47 U.S.C. §543(e)(1).

In addition, proposed Section 640(a) of the draft bill would preclude programmers from discriminating among multichannel video operators in the pricing and provision of programming. USA Cable wholeheartedly supports this provision, but urges the Committee to modify Section 640(a) to specifically forbid programmers from discriminating among cable systems based on volume program discounts, which will only worsen as a result of the vertical integration of the cable industry into the programming sector.

II. USA Cable's Costs and Operations

A. Systems and Subscribers

USA Cable's three Delaware subsidiaries, K1 Cablesystems Inc., MW1 Cablesystems Inc., and Southeast 1 Cablesystems Inc., are the franchisees of over 675 rural cable systems (or potential systems) primarily in the eastern and central state regions.[7] Although USA Cable's operations did not commence until late 1988, its subsidiaries have already fully constructed and now operate over 386 small, rural systems.[8] USA Cable is actively constructing systems franchised to its four regional operating companies and intends to complete the construction of all 675 franchises by the end of 1992. Despite the large number of franchises which USA Cable's operating companies have been awarded, their total potential subscriber base is only 157,324. USA Cable's systems pass an average of approximately 233 households, and its actual number of subscribers throughout the United States was 35,729 as of March 1, 1991, or only 92 subscribers per operating system.

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[7] USA Cable's subsidiaries operate in a 20-state region encompassing the following states: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Ohio, Tennessee, Texas and Wisconsin.

B. USA Cable's "Mandate"

USA Cable was established in order to extend television service to remote and underserved communities in the United States. The communities in which USA Cable's subsidiaries have been obtaining franchises and constructing cable systems have waited a long time for cable television service. Most cable operators have seen only a limited profit potential in operating such small systems, and the regulatory environment that existed prior to the enactment of the Cable Communications Policy Act of 1984 (the "Cable Act")[9] was a significant barrier to the financial viability of small systems. USA Cable, however, operates on the principle that while individual small communities may not be able to support cable service on their own, such service may be viable when it is provided by a multi-community, multi-system operation, such as USA Cable's.

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[8] With only three exceptions to date, USA Cable has constructed its authorized systems rather than purchasing existing systems.

[9] Pub.L. No. 98-549, §1 et seq., 98 Stat. 2779 (1984).

C. U.S. Jobs and Products

USA Cable's three operating subsidiaries directly employ approximately 120 workers in rural America and support the jobs of nearly 200 more in subcontracted construction and marketing positions related to the company's cable systems. Upon completion of all of its systems, USA Cable anticipates that it will employ at least 100 U.S. workers on a full-time basis while the total amount it will have spent on subcontracted labor will near $40 million. Additionally, all of the cable, cable electronics and hardware used by USA Cable for its systems is manufactured in the United States. To date, USA Cable has paid over $27.5 million to U.S. manufacturers and expects to invest $10 million more to complete construction of all of its franchised systems by the end of 1992. Thus, USA Cable's operations have and will continue to substantially benefit the rural U.S. economy, with an overall injection of nearly $80 million and significant on-going employment.

D. Number of Small Cable Systems and Small System Economics

1. Most U.S. Cable Systems Have Fewer than 1,000 Subscribers

As of April 1, 1990, there were 9,612 operating cable television systems in the United States with a total of 48,613,439 subscribers.[10] It should be noted that, of those systems, 5,806

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[10] Television & Cable Factbook, Cable & Services Volume No. 58, 1990 Edition, p. C-385.

(60.4%) had fewer than 1,000 subscribers.[11] Those 5,806 small systems had a collective total of only 1,766,213 subscribers (3.63% of all subscribers). In other words, the vast majority of U.S. cable systems, like those of USA Cable, are small, but their combined subscriber base represents only a minute percentage of all cable viewers.

2. Cost Savings Through Centralization

Each USA Cable subsidiary employs central management over a group of rural cable television systems clustered in the same geographic area. Cost savings are recognized by USA Cable through standardized market research and franchise application procedures, bulk equipment purchases, systematic building and operating techniques, and the sharing of operating and capital expenses among all the systems in the region. However, even such centralized management and economies of scale would not be financially sufficient to overcome the costs that would result if substantial rate regulation were to be reimposed by Congress on small cable systems.

3. High Capital and Operating Costs

Although certain cost savings can be achieved through small system centralization, others clearly cannot. Each of USA Cable's systems operates through a separate head-end, and the low number of subscribers for each head-end results in amortization over a small subscriber base. Also, the sparseness of the population USA Cable's systems serve results in a significantly higher cost per cable attachment than in urban areas. Typically, there are 75 homes per mile in urban areas, and only 30 homes per mile in the rural areas that USA Cable serves. Consequently, costs for rental of telephone or utility poles used to support cable are necessarily higher per subscriber than in urban areas, and the amount of cable that must be used in rural areas is also greater. As a result of the higher risk for small systems than for larger ones, USA Cable must absorb higher bank financing costs than large urban systems would face and, thus, the company has more difficulty obtaining equity financing.

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[11] Id.

USA Cable has also experienced a steady increase in its costs to obtain programming. Specifically, signal costs are significantly higher for small system operators, like USA Cable, since programmers typically provide substantial volume discounts, based on subscriber levels, to multiple system operators who are often affiliated with the programmers. Importantly, these increased signal costs have driven up USA Cable's operating costs substantially.

4. High Cost of Tiering

Because of the small size of each of its systems, it is not cost-effective for USA Cable's subsidiaries to offer multiple programming tiers. For example, USA Cable's systems typically have capacity to deliver 36-42 channels and currently provide an average of 19-20 channels through "superbasic" service consisting of one tier which includes 4-5 over-the-air signals and fifteen enhanced services, such as CNN, ESPN, Nashville Network, Discovery Channel, Arts and Entertainment, American Movie Classics, three Super

Stations, and the premium pay service, Showtime. For this superbasic service, USA Cable's ordinary monthly charge is $24.95. Also, because USA Cable's small systems use only one tier, rather than basic service plus one or more optional tiers, USA Cable has not had to impose connect/disconnect charges on consumers for switching from one tier to another and has avoided the use of costly scrambling equipment.

III. Comments on Specific Issues

A. Rate Reregulation

1. USA Cable's Rates are Generally Unregulated

Although USA Cable's systems typically serve sparsely populated rural areas and very small communities, only three percent of its systems are located in areas where there are not at least three over-the-air broadcast competitors. In about 655 of USA Cable's approximately 675 franchised communities, potential subscribers are capable of receiving at least three broadcast signals, in many cases including multiple network signals. Therefore, effective competition, as currently defined by Section 76.33(a)(2) the FCC's rules, exists in all but a few of USA Cable's franchise areas.[12] In fact, even in the few communities served by USA Cable which do not have effective competition, as now defined, the franchise authorities have willingly authorized the service and rate structure that USA Cable's subsidiary has proposed. Furthermore, small cable system operators are already subject to competitive forces which do not exist for large MSO's, since telephone companies enjoy a waiver of the FCC's cross-ownership prohibitions to construct and operate cable systems in communities of 2,500 population or less, which communities generally have 1,000 or fewer subscribers.[13] Hence, USA Cable's rates have been effectively determined by market forces.

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[12] Under Section 76.33(a)(2), a cable system is considered to be subject to effective competition if the entire community it serves can receive three or more unduplicated broadcast signals. A broadcast signal is counted for effective competition purposes if it encompasses the entire community with a Grade B contour or if it is "significantly viewed" within the cable community. If a cable community is not subject to effective competition under this "three signal standard," a local franchising authority may regulate the system's basic service rates.

USA Cable charges a reasonable rate for the service it provides, and it has been achieving a 50 percent start-up penetration rate because subscribers believe that the service is well worth the price charged. Nonetheless, USA Cable is very sensitive to the affordability of cable television in small communities. Because there is far less subscriber density in rural areas, it is crucial that high penetration levels are achieved to cover USA Cable's large capital and operating costs. (See pgs. 7-8, supra.) Hence, rates must be kept to a reasonable level to ensure continuing high penetration. USA Cable is also acutely aware of the unwillingness (or inability) of its subscribers to pay elevated rates. The economic realities of the areas in which USA Cable operates, where subscribers have limited disposable income, mandate that USA Cable must keep its charges at the lowest level it can while still achieving financial viability.[14]

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[13] See 47 C.F.R. §63.358 (1981).

2. Current Rate Deregulation Has Encouraged the Growth of Small Cable Systems

It has only been since the enactment of the Cable Act that cable systems have emerged in small communities and rural areas where construction and operation of systems would have been otherwise financially prohibitive. If Congress were to adopt S.12 as now drafted, to regulate the rates of small as well as large cable systems, compliance with oversight procedures of the FCC or franchising authorities would have a disproportionate impact on small system operators, and is likely to result in the termination of planned expansion or even in the curtailment of marginally viable existing service in rural areas.[15]

For example, a large city cable operator could readily cost-justify to the FCC or franchising authority the need for a particular rate increase (as a result of increased programming costs, capital expenditures, cost-of-living increases in employees' salaries, and the like), at a moderate cost per subscriber. For systems with tens or at most hundreds, not thousands, of subscribers, providing such explanations to the FCC or multiple (in USA Cable's case, several hundred) franchising authorities would be prohibitively expensive, and might well result in a greater cost having to be passed on to subscribers than would otherwise be imposed without such regulatory oversight of justifiable but not automatic price increases.

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[14] Even absent these market constraints, small system operators tend to act responsibly in maintaining reasonable cable rates. For the most part, USA Cable's operators and employees live in the regions their particular systems serve and have close contacts with local residents which, in turn, engenders a strong sense of personal accountability to subscribers.

[15] Although S.12 would authorize the FCC to oversee the regulation of cable rates, the law would allow a local franchising authority or state to request permission from the FCC to regulate a system's rates, which request would be granted if the FCC determined that the local authority had regulations in place consistent with federal standards.

In addition to the costs that cable operators would bear in having to justify rate increases to the FCC or franchise authorities if rate regulation is imposed for rural systems, USA Cable urges the Committee to consider the additional administrative and financial costs that such increased regulation could place on the FCC and franchise authorities themselves, which ultimately would have to be passed along to federal and local taxpayers. Specifically, under current Section 76.33(b) of the FCC's rules, franchising authorities engaging in rate regulation must give formal notice to the public, provide opportunities for comment, and issue formal statements as to their decisions. USA Cable has been advised by local authorities that compliance with existing regulatory requirements entails a cost of thousands of dollars to the franchise authorities, and ultimately to the taxpayer, which, in towns of only 200 households, for example, can be extremely onerous.

Similar FCC oversight of the rates of nearly all cable systems, required by S.12 would impose considerably greater financial burdens on cable operators and taxpayers and would be an administrative nightmare for the FCC. Conversely, an exemption from rate regulation for cable systems with under 1,000 subscribers would result in widespread cost savings since, as shown (p. 7, supra.), the majority of U.S. cable systems are small and thus would be exempt from regulatory oversight. A small system exemption would therefore allow the FCC or other franchising authority to devote its full attention to the oversight of large systems, which have been the true source of abuse in the area of unreasonable rate increases. Moreover, the paramount public interest would in no way be harmed by exempting small systems from rate regulation since, as also shown, small systems serve only approximately four percent of cable subscribers nationwide. (Id.)

3. Small Systems Should Be Exempt from Rate Regulation

Although USA Cable supports the adoption of legislation to reregulate the rates of large urban cable systems, it submits that any revised regulatory scheme imposed by Congress should be premised on a clear understanding of the fundamental economic differences between large urban and small rural cable systems. Cable systems in rural areas are far less economically viable than large urban systems. Because of the substantially higher costs of providing cable to small rural communities, subscriber rates in rural areas necessarily cannot be as low as rates could potentially be (but may not actually be) for basic service in urban areas (assuming that the "basic" tier provided by the urban systems does not include a significant number of enhanced services). Moreover, cable rates of small, rural systems normally are more closely tied to actual higher costs than to the desire for profitability. In contrast, as the Committee knows, the substantial numbers of mergers and acquisitions of systems by large MSO's, coupled with the high cost of financing, has been fueling cable rate increases in urban areas. USA Cable's experience has shown that there is no need for rate regulation for small systems where the market has effectively forced operators like USA Cable to keep charges as low as their high capital and operating costs will permit.

USA Cable respectfully urges the Committee to consider the valuable service that small, rural cable systems provide to their subscribers. Such systems certainly cannot benefit from the same economies of scale that apply to urban systems. In this connection, the impact that any increased rate regulation would have on the ability of small system operators to provide such service should also be weighed. Accordingly, USA Cable recommends that if Section 623 of the Communications Act is amended to impose widespread rate regulation without retention or expansion of the five-percent annual increase for regulated rates, that the requirements should not apply to systems with fewer than 1,000 subscribers.

4. If a Small System Exemption is not Adopted, the Five-Percent Annual Increase (or an Acceptable Alternative) should be Retained

If small systems are not fully exempted from any new proposed rate regulatory legislation, USA Cable fully supports retention of the five percent cap in the Cable Act for annual rate increases in areas lacking effective competition. Alternatively, USA Cable suggests adoption of a maximum percentage increase based on actual increased expenses and some portion of the rise in the Consumer Price Index (perhaps half to two-thirds of the increase). In any event, retention of an allowable annual increase for regulated rates would take into account the increasing expenses, particularly of small system operators like USA Cable.[16]

B. Programming Discrimination

USA Cable also encourages adoption of newly-proposed Section 640(a) to eliminate discrimination in the provision and pricing of programming to promote competition among multichannel video services. As specifically recognized by the Committee in Section 2(7) of S.12, widespread common ownership of cable operators and programmers has vertically integrated the cable industry, with the result that program suppliers have the incentive and ability to favor affiliated cable operators over non-affiliated cable operators, like USA Cable. In USA Cable's experience, video programmers consistently provide substantial volume discounts to their large MSO affiliates, while USA Cable subsidiaries are denied similar discounts due to the small nature of their systems and their comparatively smaller subscriber base.

The high (and rising) signal prices from these program providers have dramatically driven up the operating costs of small systems, resulting in higher subscriber rates and threatening the ability of small system operators, like USA Cable, to continue to provide essential cable service to remote areas. Accordingly, USA Cable submits that proposed Section 640(a) should be clarified to specifically forbid discrimination among cable systems in the pricing and provision of programming based on volume discounts offered by programmers.

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[16] For example, the cost to cable companies of acquiring the rights to carry enhanced programming (such as ESPN) have been rising dramatically. These increased costs have driven up USA Cable's costs considerably.

IV. Conclusion

The Cable Act was a sound legislative mandate to reduce unnecessary regulation, and has led to an environment fostering the introduction and growth of cable television in sparsely-populated areas that would not otherwise receive multiple programming choices. Adoption of the Cable Consumer Protection Act, as drafted, to substantially reregulate the rates of small cable systems would have a disproportionately adverse effect on numerous small system operators and would stifle the ability of such operators to continue to provide essential cable service to rural regions of the United States. Additionally, proposed FCC oversight of cable rate regulation for small systems would create unwarranted and widespread financial and administrative burdens for small system operators.

USA Cable supports proposed reregulation of the service and equipment rates of large, urban cable systems, but submits that an exemption from the legislation for small cable systems is crucially required. Alternatively, USA Cable strongly supports retention of an allowable annual increase for regulated rates.

Finally, in order to reduce unfairly high signal costs to small systems resulting from vertical integration of the cable industry, any new legislation should further preclude discriminatory volume discounts in the provision of programming.

USA Cable believes that its suggestions would permit Congress to guard against excessive and unjustifiable cable rate increases and the abuses of large MSO's and their affiliated programmers, without unnecessarily restricting cable operators from extending the benefits of cable service to remote areas of rural America.

Respectfully submitted,

USA Cablesystems, Inc.

Testimony of Richard Gamberg

SATELLITE TV allowed the world to watch China and Tieneman Square.

SATELLITE TV allowed us to keep abreast like never before of a war our country was involved in a half a world away. SATELLITE TV has been credited with providing people in countries like Poland and China with news and information not subject to the censorship of state-controlled media. Yet, in this country, we have allowed the cable monopoly to use knock-out tactics to prevent this wonderful technology - SATELLITE TV - from being a viable competitor. It is only natural for a monopoly to attempt to prevent any competition - once there is competition, there no longer is a monopoly, and the ability to price gouge (receive monopoly profits) is lost. The stranglehold of cable on the multichannel video marketplace not only affects satellite dish owners, but it affects cable subscribers as well with every bill they receive. And it also affects those who can't get, or choose not to pay the price for cable as more and more of what once was free advertiser-supported television migrates to pay cable. Alfred Sikes, Chairman of the FCC, was recently quoted as saying that it was a small band of satellite dishowners that served as the catalyst for the current debate over what to do about the cable monopoly. It is clear to me, as a home dishowner that sees the discrimination and unfairness to which I am treated to by cable that Congress must act to bring this monopoly under control. That means regulation as a public utility. We all agree that competition is preferable to regulation, so the most important aspect of any legislation should be to foster an environment whereby competition can be expected to replace regulation. On behalf of the consumers and independent satellite dealers of C-SAT/K-SAT, the Satellite Dealer Forum and the K-SAT Quality dealer program, I endorse the concepts embraced in SB12. This testimony is intended to provide hard, empirical evidence of the knockout tactics employed by cable - justifying a tough response, and to provide details and rationale for specific areas of the bill that need to be strengthened. While some would point to the new variety of programming made available by the cable industry, it is important to understand that this is the result of a "welfare state" created by the cable monopolists. Subscribers have little if any choice in the selection of channels that make up "basic" cable service. Potential new programmers find that it's pretty hard to get on the cable systems of the big MSO's, and if they show some interest, they'll also want some ownership and control. But, TCI has no problem launching - out of the blue - a new "low-cost" premium movie channel. Nor does TCI have any reservations on flexing its muscle as demonstrated by "Arrogance Revisited"[1] While the nation's attention was riveted on the Gulf War, TCI blocked the sale of The Learning Channel by taking steps to remove it from its cable systems, and within a few weeks locked up the purchase of the channel itself for MILLIONS of dollars less than TLC stood to receive from the purchase TCI effectively blocked. While CNN received acclaim for its recent reporting of events in the Persian Gulf, the fact that this was the first "pay-per-view" war was almost universally overlooked. CNN wanted cable operators to pay a surcharge to cover it's war-related expenses (at the same time it raised it advertising rates 400% - from $5000 to $20000 for a 30-second spot), but operators made it clear that in the end, cable subscribers will pay.

I hope that members of the sub-committee understand that the problems facing the satellite dish industry are directly tied to the cable problem that has been the subject of much scrutiny by the congress. It is for that reason that many of our members keep us informed of developments involving cable. I have included as part of this testimony alarming evidence of the need to provide for at least temporary re-regulation of the cable industry in order to control this unregulated monopoly.

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[1] See attachment

THE KNOCKOUT TACTICS:

- **ONLY ON CABLE**

Cable operators and programmers have consistently and systematically engaged in false and misleading advertising regarding the availability of satellite-delivered programming. The fact is that nearly all of this programming is available to home satellite dishowners - which is NOT cable. To say that this programming is only available on cable, or is exclusively on cable, is a bald-faced lie. Continued advertising of these untruths help to perpetuate consumers' belief that the ONLY way to receive this programming is to subscribe to cable. The cable industry would like to turn their lie into reality as they suggest that any new legislation should legitimize their attempt to block competition through exclusivity. Permitting exclusivity would only strengthen an already giant monopoly and impede competition - for there can be no competition without a competing product. The giant vertically-integrated cable monopolies have and continue to consolidate and buy up equity in the major programmers creating a single distribution chain that shuts out any competition - TVRO, Wireless, DBS, and even competing cable companies.[2]

- **PRICE DISCRIMINATION**

Cable programmers have consistently engaged in price discrimination against the home dishowner and independent program distributors to TVRO. The NRTC (National Rural Telecommunications Cooperative), a non-cable distributor to TVRO, has filed a complaint with the Federal Communications Commission charging discrimination at the wholesale level. This Complaint has been pending at the FCC for nearly two years, and FCC Chairman Alfred Sikes recently described the preliminary findings to indicate there was unexplainable discrimination. By keeping the wholesale price of the programming for TVRO distribution as compared to cable distribution causes the retail price to the TVRO consumer to be artificially high. This serves to perpetuate the cable monopoly by making TVRO a poorer value than it would be in a competitive environment. **ACCESS** and **NON-DISCRIMINATORY PRICING** provisions, as included in S12, are the keys to fixing this problem. The language in S12 needs to be modified to strengthen these provisions, and to eliminate ambiguity with respect to access rights for TVRO. The bill references C-Band Satellite delivery; however, the vast majority of homedishowners have systems compatible with K-Band delivery, and a significant number already receive and use K-Band. Access must be provided without regard to band - otherwise, the cable monopoly can simply switch delivery of their programming from the current C-Band satellites to newer K-Band satellites and deny access to 3 million current dishowners.

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[2] See attachment

- **The SCI-FI Channel**

New programmers not owned by the cable giants face an uphill battle getting carriage on cable systems. The SCI-FI channel is but one example. This programmer has offered to provide its programming to any cable system that agrees to carry it at NO CHARGE for two years along with equity ownership of the channel. Yet, while offering this sweet deal to cable operators, the nation's largest and most powerful cable conglomerate apparently wasn't interested in a sweet deal for TVRO distribution. TCI, through its Netlink subsidiary, has agreed to offer the SCI-FI channel to home dishowners and will pay SCI-FI 50 cents per month per subscriber. While Netlink has not priced SCI-FI to the homedishowner, it is reasonable to assume the price will be substantially more than the 50 cents Netlink will pay to SCI-FI. No matter what price is charged, it will be INFINITELY greater than that which a cable operator will pay. The debut of the SCI-FI channel has been pushed back to the end of 1991 to the delight of cable operators: they'll be able to point to the new channel as part of their justification to angry subscribers of their regular rate increases ... yet, the channel will cost the cable operator NOTHING![3]

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[3] See attachment

The SCI-FI channel is not an isolated example. On average, cable subscribers pay about 50 cents per channel per month for basic cable, while homedishowners are charged, on average, about $1. per basic channel per month. But, a homedishowner should pay less than a cable subscriber - the cable rate must include the cost of the plant, equipment, maintenance and overhead of the cable company in addition to the cost of the programming, while the homedishowner is essentially a standalone cable system. The homedishowner must purchase and maintain the receiving and decoding equipment. The homedishowner is simply purchasing programming, while the cable subscriber is purchasing a service that requires no investment or maintenance on the part of the subscriber. The monthly rate a cable subscribers pays must cover these costs incurred by the cable operator. The reason for this price discrimination is obvious - if a homedishowner were able to purchase a subscription to the programming at rates comparable to those paid by cable companies, TVRO would become a much more attractive alternative - resulting in a loss of market share and profits by cable operators who in many instances own, control, or exert undue leverage on the programmers.

- **CABLE IS "DOOMED" if it must face competition**

The attitude of the major cable companies is that there just isn't room for competition. Huntsville, Alabama is one of only a handful of cities where there are competing cable companies. In 1990, TCI-controlled Bresnan Communications offered to buy the competing companies --- only if it were allowed to purchase BOTH competing systems. The city council would not permit such a sale. Then, this year, Comcast requested permission to buy out and merge with it's competitor. Again, the city council just recently denied the request. It is revealing to observe how the cable industry's trade paper - MultiChannel News - reported this recent development:

> Cable Alabama and Comcast Cable of Huntstville Inc. **appear doomed to competition** in Huntsville, Ala., after a City

> Council vote last week officially blocked the companies' merger plan. Cable Alabama, in applying for a transfer of its franchise to Comcast, raised the issue of its constitutional right not to speak, and suggested that a vote to block the merger could create a legal liability for the city.[4]

- **COMPETING CABLE COMPANIES ARE AN ANOMALY:**

Out of over 7000 cable systems in the US, only 53 operate with a competing cable company. In those 53, rates, on average are 50% lower than the rates of those without competition. Some lawmakers think it's the cities fault for not granding a second franchise. The fact is, it doesn't matter if a city wants to offer a second franchise - they won't be able to find a cable company willing to come in and compete with an existing company. Where competition exists, the giant MSO invariably attempts to eliminate it. (Footnote) The fact is that there are many cities BEGGING for a second cable company to come in and compete --- but they get no takers. If a city is fortunate enough to find a willing second cable company, the NCTA has a coordinated, high-pressure, scare-tactic campaign for use by the MSO cable operator. Part of this campaign is a mailing to everyone in the city telling how terrible a second cable company would be: prices would go up in the long run; streets and sidewalks would be torn up causing much inconvenience and unnecessary expense, etc: Included for the record is a letter, typical of assistance provided by the NCTA, that was mailed to all residents of Delhi Ohio in October of 1990 when that city was considering a second cable company. The UNITED VIDEO CABLEVISION, INC. letter included a postage-paid "opinion card" for the resident to return in order to present to the city Trustees. This letter warns residents of the terrible consequences that will occur if a second cable franchise is granted:

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[4] MultiChannel News - page 2 March 11, 1991 - see attachment. Comcast Cable followed through with it's threat to file a lawsuit against the city the week of March 20.

Why is cable competition a problem?

Historically, overbuilds don't benefit anyone, but cause disruption and inconvenience for many residents of the community.

Nine times out of ten, only one cable operator survives after two years of competition according to independent studies

The surviving cable operator must raise rates to justify the costs of short-term competition.

Why should you be concerned?

When an overbuild is installed, there is **tremendous disruption** for the whole community, subscriber and non-subscriber alike.

We urge you to help avoid this costly situation by sharing your concerns about a cable overbuild with your Trustees.[5]

- **WHERE REGULATION IS PERMITTED, the 1984 CABLE ACT IMPOSES UNREASONABLE BARRIERS TO EFFECTIVE REGULATION**

The evidence supporting a change to the 1984 Cable Act is demonstrated by what has happened in Juneau, Alaska. Juneau is served by only 2 over-the-air stations, clearly not facing "effective competition" even with the current standard. However, the Alaska legislature, in its wisdom, exempted cable from regulation, unless 20% of the subscribers petitioned for regulation, in which case the Alaska Public Utilities Commission would be permitted to regulate cable. One of our members, Larry Buzzell, organized a petition campaign in Juneau in 1989. After obtaining over 1500 signatures, they were submitted to the APUC. After 3 months, the APUC determined that, after disqualifying a number of signatures, not enough had been collected. Larry and his friends collected another 1000 signatures in one weekend. The APUC opened a docket in November, 1990 to regulate Cooke as requested by the people. A ruling is not expected until the second half of 1991 - **but the positions taken by the**

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[5] See Attachment

Cable Operator should send a resounding warning to all in Congress that unless the Cable Act of 1984 is amended, NO ONE will be able to EFFECTIVELY and EFFICIENTLY regulate cable.

Cooke Cablevision, the monopoly provider in Juneau, filed a brief and "supporting cost data" stating that :

> (1) The APUC could regulate only the "basic" tier of service, consisting of 8 channels which it has "always" offered for $5.
>
> **(2) The installation charge for this "basic" service is $500.**
>
> (3) The APUC has no authority to roll-back rates, nor does it have any authority to prevent the rate being raised 5% annually without regard to the cost of providing the service.[6]

(Based upon information supplied by Larry Buzzell, there is one subscriber of the $5. basic service. Everyone else [approx. 6000 homes], pays $42.90 for the "expanded basic".)

Cooke Cable submitted a cost analysis in support of its $500 installation charge for this service (it charges $25 for installation of the $42.90 "expanded basic" service). Even if one were to assume that all the cost allocations are correct, Cooke has used **30%** as a FAIR RETURN ON INVESTMENT, and in doing so only comes up with a cost of $408! [The return on investment with a $500 rate is actually a **42.9%** return on investment, based upon their cost assignments which I would dispute. Among other things, I would note that no cost of debt was used, which assumes either the company has no debt, or they are seeking an equity return on debt. Traditional utility regulation and sound economic theory would not permit a utility to operate with no debt (which has a lower cost than equity).]

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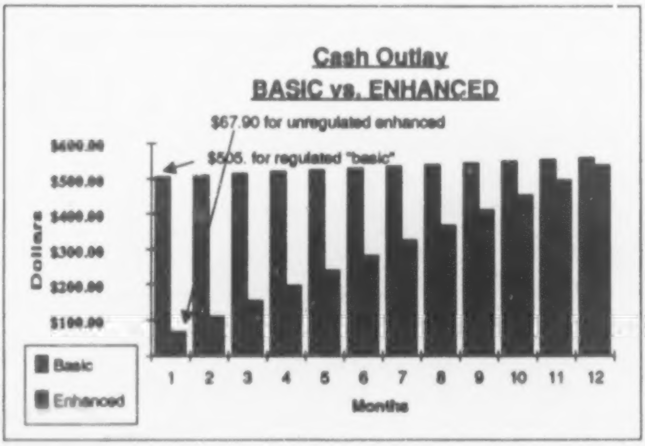
[6] See attachment

WITH COOKE CABLEVISION'S $500 installation rate for $5. "basic" service versus it's $25 installation charge with the $42.90 "expanded basic" service, a customer choosing "basic" will have spent MORE money after one full year than the customer choosing to install "expanded basic". (It should be noted that the incremental cost of providing Cooke's expanded basic is only $2 - $3 more than the cost of providing the $5. basic service - yet the rate is over 700% higher!) To suggest that regulation must be based on EXISTING rates at the time regulation is asserted without regard to the cost of providing service, and to exempt from regulation the very ADVERTISER-SUPPORTED services that the vast majority of subscribers wish to receive with cable is to effectively eliminate any impact on cable's monopoly pricing power. This provides consumers no protection from unfair rates with no competitive alternative. **CONGRESS MUST ACT.** Even if the FCC revises its effective competition standard, those who think the problem will be addressed will be subject to the rude awakening of cable's ability to preserve its monopoly.



Even after 12 months, the Juneau, Alaska customer choosing Basic service has paid more than the enhanced customer.

With this in mind, S12 must be strengthened to permit regulation of not just over-the-air stations available for free without cable, but ADVERTISER-SUPPORTED "basic cable" services as well. The cable subscriber has practically no choice in his

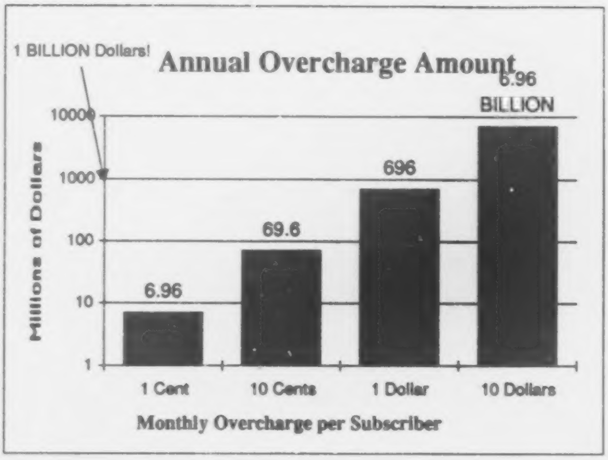
purchase. In response to the threat of regulation, many systems offer a new, stripped-down basic service consisting mostly of channels that can be received free with an antenna, and a multi-channel "standard basic" service. The cable operator collects money for each and every additional channel provided - and many of those channels are owned in part by the parent MSO. The money collected by channels carrying sports programming fuels the move to cable of "desirable" programming. In most cases, the subscriber who wants just CNN must also subsidize ESPN, regional sports channels, MTV and a host of other channels - owned by the cable MSO giants.

- **IF THE PRICE OF CABLE IS EVEN ONE PENNY HIGHER THAN IT SHOULD BE, A FEW MONOPOLISTS ARE REAPING MILLIONS**

There are those who would end the debate on cable by saying what's the big deal? Cable, at $20 a month, represents an excellent value. What's all the fuss about? While pricing of cable services in areas with real competition show that cable rates could be cut in half, (nearly $10), each PENNY overcharged represents millions. I don't think Congress would consider granting me the right to collect a penny every month from half the homes in this country. Yet, I can't understand why congress is reluctant to fix the unfair advantage given Cable by creating a license to take dollars away from half the households in this country. If the rate is overpriced **by just one penny,** consumers are being gouged by about 7 MILLION a year. Each dollar overcharged per month produces an annual windfall of about **700 MILLION dollars per year for the cable industry.** **(See chart on top of following page)**

- **SIGNAL THEFT**

The cable monopoly's knockout tactics against satellite dishowners is bad. But, dishowners are faced with not one - but two monopolies. General Instrument Corp, (GIC) is the monopoly provider of the satellite descrambler that must be used by a dishowner wishing to receive scrambled satellite-cable programming. Despite calls for



An overcharge of just 1 penny equates to almost $7 million annually.

adoption of a standard, GIC retains its monopoly. Despitethe fact that GIC's decoder has been widely compromised, GIC maintains that consumers will have to pay the cost of switching to a higher-security system. One reaction of consumers to unfair treatment is to resort to illegal activities. Cable faces a significant problem with theft of signals. But, with TVRO, industry estimates are that around 80% of dishowners have illegally modified descramblers allowing them to receive all scrambled programming without paying any fee. We do not condone signal theft or other illegal activities; however, this outrageously high theft demonstrates the unwillingness of the vast majority of dishowners to pay the inflated prices controlled by two monopolies. This illegal activity can be virtually eliminated by implementation of provisions of S12 that provide for non-discriminatory pricing.

- **TELEPHONE COMPANY COMPETITION IS, AT BEST, YEARS AWAY**

Competition to cable from home satellite is here today --- it's just that the unjustifiable control over pricing, terms and conditions by the cable monopoly prevents home satellite from being an effective competitor. Some feel that a solution to the cable monopoly problem is letting the telephone companies provide cable service. At best, such competition is YEARS away - and even longer for many rural areas. Home satellite can and should be a component of effective competition - NOW. Home satellite can provide competition to cable now if the knockout discriminatory tactics employed by the cable monopoly.

- **CONCLUSION**

In the more than 2 years I have been actively seeking fair treatment, I have seen literally thousands of items that demonstrate we have an untenable situation with the monopolies dominating the multi-channel video marketplace. The materials included with this testimony are only a sampling. I hope the Congress will act swiftly to promote competition and provide relief through interim regulation of the cable industry. To promote a competitive environment, and provide consumer protection in the interim, I urge the sub-committee to amend S12 to include:

Access provisions for home dishowners that do not discriminate between bands (C vs. K)

Rate regulation for advertiser-supported "basic cable" channels in addition to regulation for the tier including over-the-air and public-access channels.

STATEMENT FOR THE RECORD OF THE

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Mr. Chairman and members of the Subcommittee:

My name is Paul Rodgers and I am the General Counsel for the National Association of Regulatory Utility Commissioners (NARUC) on whose behalf I submit this statement for the record today.

As you may know, the NARUC is a quasi-governmental, non-profit organization founded in 1889. Within our membership are the governmental agencies of the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands which are engaged in the regulation of utilities and carriers. Our chief objective is to serve the consumer interest by seeking to improve the quality and effectiveness of government regulation in America. More specifically, the NARUC is composed of, inter alia, State and territorial officials charged with the duty of regulating the telecommunications common carriers, and cable television in six States, within their respective borders. As such, they have the obligation to assure the establishment of such services and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable.

Prior to enactment of the 1984 Cable Communications Policy Act, seven state utility commissions regulated the provision of cable television service. The NARUC was active in opposing the Act which allows most cable operators to set their rates for subscribers without any government influence--local, state or federal.

We feel that cable companies are, with rare exception, no less monopolies within their service territories than electric, gas, water or telephone companies. If left unregulated, cable operators will continue to exploit their monopoly status by charging exorbitant rates to subscribers; discriminating in favor of programming in which they have *a financial interest; charging local independent stations for carrying their broadcasts or not carrying them at all; and limiting the sports and entertainment programs available for free on regular television.*

In another disturbing trend, cable systems are becoming more and more vertically-integrated and, as a result, are denying their only competitors, wireless cable, access to a significant segment of cable programming.

Despite this market power, the 1984 Cable Act provides the industry with several unnecessary advantages. For instance, cable companies' "compulsory license" allows them to retransmit broadcast signals for nominal payment. The Act has also made cable franchise renewals virtually automatic.

Perhaps the most harmful aspect of the law, however, is that it gives the Federal Communications Commission (FCC) the authority to define the standard for regulating cable rates. In doing so, the Commission unfortunately has determined that over-the-air television provides effective competition for cable. That judgment has allowed cable operators in almost every community in the nation to set rates freely. The result is that rate increases have been as high as 300% in some areas. While the FCC is currently in the process of setting new effective competition standards, their proposals do not reflect the variety of local conditions that currently exist and do not address the concerns of each community. For these reasons, the NARUC believes the States, rather than the FCC, should have the right to set effective competition standards.

The NARUC urges your Subcommittee to consider legislation which would repeal those portions of the Act which preempt state and local officials from regulating cable *rates and services. It has become apparent that the limited authority granted the FCC has been inadequately exercised. State and local governments are in a better position to assess the degree of competition in a given area and to protect the interests of the viewing public.*

If a repeal of these preemptive provisions is unattainable, then on behalf of the NARUC, I respectfully offer amendments to the cable television legislation you are presently considering which will provide further protections for the subscribers of both cable television and telephone services.

These proposals are based on the policy resolution adopted by the NARUC Executive Committee which is attached. They reflect our belief that State and local officials should not be preempted from regulating cable television rates and services.

Currently, the State utility regulatory agencies in Alaska, Connecticut, Delaware, New Jersey, Rhode Island and Vermont have primary jurisdiction over cable television in their States and several more are in the process of seeking that authority from their State legislatures. Of course, most States continue to vest cable television franchising authority with municipalities.

In S. 12, you are considering allowing franchising authorities to "enforce FCC-set formulas" for regulating basic cable rates. In light of this preemption of local authority, the NARUC proposes that when the franchising authority is the State utility regulatory agency with jurisdiction over telecommunications, that authority should have a rebuttable presumption of compliance with any FCC certification requirements or regulatory guidelines. This would show appropriate deference to State utility commissions which, *unlike municipalities, have extensive regulatory experience and do not require FCC oversight. However, this proposal would not preempt the authority of State legislatures to designate franchising authorities.*

While the NARUC would prefer that State commissions be permitted to regulate cable rates in whatever manner they find to be in the public interest, if you seek to impose national standards or guidelines for local regulation, we urge you to direct that they be developed by a Federal-State Joint Board convened under section 410(c) of the Communications Act of 1934. In that way the "formulas" will reflect the perspectives of the agencies which actually will enforce them.

In addition, the NARUC feels that the types of services subject to rate regulation by local authorities should be as broad as possible and should include at least any service tier providing: retransmission of local television broadcast signals; public, educational, or governmental access channels; or advertiser-supported programming.

Finally, in the event the Subcommittee is considering any role for local telephone companies in this bill, the NARUC urges you to consider the following when evaluating his proposal: 1) States need to be able to determine the extent to which cross-ownership may occur within their States based on the interests of telephone company ratepayers; 2) States must be free to use the cost allocation methodologies they have found most effective for fairly allocating intrastate network costs, The NARUC views cable service as a common carrier service and not a broadcast service; 3) States must retain the authority to oversee investment in and modernization of the telephone network to ensure that all costs which are passed on to ratepayers are prudently incurred; and 4) States must retain the authority to set intrastate depreciation rates [authority that was upheld by the Supreme Court in Louisiana PSC v. FCC, 476 US 355, 106 S.Ct. 189 (1986)]. Thank you.

STATEMENT OF STU SCHANKMAN
NATIONAL EXECUTIVE DIRECTOR
SATELLITE DEALERS COALITION (SDC)

HEARINGS REGARDING
THE CABLE TELEVISION CONSUMER PROTECTION ACT OF 1991, S. 12
COMMUNICATIONS SUBCOMMITTEE
SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
HELD ON MARCH 14, 1991

Mr. Chairman and Members of the subcommittee, my name is Stu Schankman and I am the National Executive Director of the Satellite Dealers Coalition (SDC). I appreciate the opportunity that you and the subcommittee have provided to interested parties to offer statements subsequent to the Committee's hearings on S. 12 on March 14, 1991.

The Satellite Dealers Coalition (SDC) is a National Organization comprised of approximately 2000 satellite TV dealer members, including members of 23 State affiliated associations. Additionally, I have been asked to speak on behalf of the Consumer Satellite Coalition (CSC), an organization that represents the interests of satellite TV system owners nationwide.

We believe that collectively the SDC and CSC represent the reasonable voice of both retailers and/or installers of Home Satellite Television systems, and the approximate 3,000,000 consumers who own such equipment and enjoy the benefits of satellite TV nationwide.

The SDC and CSC support the "Cable Television Consumer Protection Act of 1991" (S. 12) because it recognizes that in order to have a competitive market and to achieve the goal of universal access to television service, there must be access to programming at non-discriminatory prices, terms and conditions for all delevery technologies.

Specifically, the Home Satellite Dish (HSD) market can never reach its true potential if the cable industry is allowed to continue to control programming sources, distribution and pricing. Since 1986, Satellite TV dealers have been denied the ability to compete effectively and grow as small businesses primarily located in rural America. Due to the cable industry's grip on programming access and its pricing, consumers have affectively been denied the ability to intelligently choose satellite TV as an alternative delivery system. Questions surrounding access to programming and unfair prices for programming have confused consumers and their ability to fairly assess the true value of a satellite TV system.

Mr. Chairman, all our dealer constituents want is the ability to compete fairly. Furthermore, all our consumer constituents want is a marketplace in which they have the ability to intelligently choose one television delivery system over another.

One glaring example of the inequity that exists when comparing a satellite TV system household and a cable TV system household which is not often mentioned follows:

In a satellite TV household, if Dad wants to watch a "G rated" subscription movie on one channel and the kids want to watch the very same "G rated" movie in another room on another TV, yet still have the ability to periodically flip over to MTV, two separate satellite receiver/decoders are required and two separate subscriptions to each programming service must be purchased at full price. Three TV's require triple hardware cost and triple subscriptions, etc..

Oviously, with cable TV, independent access to channels on multiple TV's within a cable TV household costs either little or nothing for hardware per month, and only one subscription has to be purchased for any number of TV's. It should be noted that programmers charge cable companies on a basis of households only and not the number of television sets within a household.

This is grossly unfair and not the fault of HSD technology as multiple decoders can be authorized within a given satellite TV household, but programmers are not willing to do so.

It would seem that fair access to programming and fair pricing would promote the public interest by extending the benefits of information, education and entertainment to all Americans, regardless of their geographic local. Unfortunately, the cable industry has effectively stiffled competition from HSD technology even in rural areas which are not and will not be hard-wired for cable service.

The next generation of direct-to-home satellite technology is the Direct Broadcast Service (DBS), which has the potential to develop as a universal service offering in rural areas and as a direct competitor in cable areas. Satellite TV dealers and SDC members certainly do want to be active participants and consumers want to be the beneficiaries of the exciting opportunities and new options available through DBS.

Congress must act now to ensure that the current home dish market and future DBS technology will both develop to their true potential.

The problems that plague our industry and twart its ability to grow are clearly evidenced and articulated in the testimony provided to the Committee by Bob Phillips, CEO of the National Rural Telecommunications Cooperative (NRTC) on March 14, 1991. Every word of Mr. Phillips' testimony is accurate. Both the SDC and CSC respectfully urge you, Mr. Chairman, and the rest of the Committee to place strong weight on Mr. Phillips' testimony throughout your deliberations.

Ironically, some of the constituents who Mr. Phillips represents, directly compete with some of SDC's constituents in some local markets. Although, in several cases, Mr. Phillips' local rural electric co-operatives have worked closely with satellite TV dealers, other co-ops choose to directly compete with our members in the sale, installation and service of satellite TV hardware as well as the sale and service of programming subscriptions. When we, as representitives of members who actually compete, join together in an attempt to help focus both Congress and the FCC on the seriousness and effectiveness of the cable industry's monopolistic practices, this factor alone should underscore the urgent need for Congress to act swiftly to open fair competition. Consumers need the right to choose with whom they want to do business.

We look upon our members as analogous to the old "family doctor" who used to make house calls. Satellite TV dealers do just that for their customers. In today's fast paced society it seems that any technology and product that can provide an ability to revisit these old values while simultaneously building strong, enduring customer relationships has to be in the best interest of all consumers.

However, if consumers continue to be denied access to programming, if prices are held artificially high, and if the cable industry is allowed to manipulate the marketplace to their own advantage, HDS technology, DBS technology, and/or any other delivery system will be stiffled. Why should the television consumer continue to suffer and languish in the grip of the cable monopoly?

Mr. Chairman, the marketplace solutions to our problems have not worked. Competition is the sensible answer.

In conclusion, we would ask the Committee to consider what we believe to be at the very heart of the entire cable TV re-regulation debate. If the cable TV industry wants to be able to operate as a free market industry, then it should be subjected to real competition. They should not be allowed to manipulate program access and pricing to stifle their competition. If, on the other hand, the cable industry wants to operate as a utility, monopoly, or an exclusive delivery system, then it should be subjected to government regulation like any utility.

It's high time that the Cable Industry is put in the position to have to choose what they want to be. They should not be allowed to capriciously switch back and forth between one convenient position and the other.

Once again, Mr. Chairman and Members of the Committee, the SDC and CSC support passage of S. 12. We thank you for the opportunity to respond and stand ready to provide any additional information you may require.

Respectfully,
The Satellite Dealers Coalition (SDC)

Stu Schankman
National Executive Director

STATEMENT OF
ROY M. SPEER
CHAIRMAN AND CHIEF EXECUTIVE OFFICER
HOME SHOPPING NETWORK, INC.
BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS -
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
MARCH 14, 1991

Mr. Chairman and members of the Subcommittee, my name is Roy M. Speer. I am Chairman and Chief Executive Officer of **Home Shopping Network, Inc.** **("HSN")**, the nation's leading electronic retailer. HSN delivers its HSN 1 programming service direct by satellite to 1922 cable systems throughout the country but we are denied access to 3000 cable systems by the cable company owners of our largest competitor, QVC Network, Inc.

HSN also is the largest group owner of broadcast television stations in the country. HSN owns and operates 12 UHF stations and has helped finance the construction and acquisition of six additional UHF stations in partnership with minority entrepreneurs such as **Blackstar Communications, Inc., Jovon Broadcasting Corporation, Roberts Broadcasting Company** and **Urban Broadcasting Corporation.** Through its HSN 2 service, HSN provides full-time daily programming to its 12 stations and 16 full time affiliates. These 28 stations each locally produce and air 21 hours of weekly nonentertainment and issue oriented public affairs programs in addition to the HSN shopping format. Additionally, HSN provides daily programming part time to 67 stations, 54 of which are overnight affiliates and to 16 LPTV stations, a total of 111 affiliated stations. The 111 affiliates reach a majority of American homes. However, statistical data we have prepared on the owned and operated stations and full time affiliates show that they are denied access to over 40% of cable homes in their markets.

As both a broadcaster and a video programmer, HSN's first hand experience demonstrates the need for the enactment of the provisions of S. 12 that will safeguard local television broadcasting and unaffiliated video programmers from the undue market blocking power of the cable industry. HSN appreciates this opportunity to support legislation that will promote competition through the adoption of: (1) a constitutionally supportable provision mandating cable carriage of qualified full power, local television stations[1/] and (2) a provision prohibiting a cable operator from favoring programming of affiliated (vertically integrated) video programmers.

THE PROBLEM

When Congress passed the 1984 Cable Act, its intention was to stimulate an infant industry and, thereby, give Americans access to a wider abundance of home video information and entertainment. In large part, the 1984 Act has succeeded. Yet, as the Committee on Commerce, Science and Transportation noted in its report on the 1990 cable bill, Congress also was concerned that deregulation should not give cable an unfair competitive advantage over local TV stations recognizing that "when [cable] provides service to a home, it almost always becomes the sole source of video

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1/ HSN applauds the decision of the sponsors of S. 12 to omit a minimum viewing standard from the must carry provision of the bill. As the Commerce Committee correctly observed last year, a must carry provision without a minimum viewing standard "will help new stations and stations that target special audiences to obtain carriage thus increasing the diversity of local programming available to viewers." Committee on Commerce, Science and Transportation, Report on the Cable Television Consumer Protection Act, Senate Report 101-381, p. 36 ("The 1990 Report").

programming"[2], the gateway to the home. Indeed, the FCC has noted that "the cable industry encouraged its subscribers to take down their antennas and eliminate their capability to receive signals off-air." The 1990 Report cited evidence that "98 percent of cable homes do not have roof top antennas connected to their television sets. . . ."[3]

HSN's experience as a video programmer and a local TV broadcaster demonstrates that Congress' concern was warranted and that Congressional intervention is essential to create a level competitive playing field. The problem of unfair cable competition is growing as the industry matures. Cable penetration is nearly 60% and the horizontal integration of cable ownership into fewer hands magnifies the cable industry's ability to discriminate against its video programming competitors.[4] At the same time, cable's increasing and unchecked vertical integration has given cable operators the ability and incentive to "refuse to carry other programmers" in which they are not equity participants.[5] **These three developments have combined to make cable the Ma Bell of the 1990s.** In virtually every market, there is only one multi-channel operator and, hence, no competition. Thus, cable operators can and do select what local

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2/ Id. at 47. "[O]nce individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal." "Among other problems, 98 percent of cable homes do not have roof top antennas connected to their television sets...." 1990 Report, pp. 35-36 (citation omitted).

3/ Id. at 35-36 (emphasis added).

4/ The Commerce Committee noted last year that "with the increased concentration in the cable industry, the large MSOs have the market power to determine what programming services can 'make it' on cable." Id. at 38.

5/ Id at 23.

TV stations are to be carried among those actually available in the market and whether unaffiliated video programmers in which the cable operators do not have an equity position are carried.

MUST CARRY

This Subcommittee is well aware of the nearly 30 year history of must carry regulation imposed by the FCC, culminating in the 1985 Quincy court decision[6] and the 1987 Century court decision.[7] I will not rehash that history but rather will focus on the following three basic points:

Point (1) A must carry requirement is absolutely essential for small local television broadcasters who are most at risk now that cable has become the dominant video delivery mechanism. Cable is clearly the gatekeeper to the home.

Point (2) Local television stations have a statutory obligation under Section 307(b) of the Communications Act to provide programming to serve their local communities. Congress has mandated that the FCC issue and renew licenses on this basis. The Government has a substantial interest in continuing this 57 year old system of broadcast localism.

6/ Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

7/ Century Communications Corp. v. FCC, 857 F.2d 517 (D.C.Cir. 1987).

Point (3) Must carry legislation tied to local television stations' 307(b) programming obligations is an approach that is constitutionally sound.

Point 1

With responsibility for the operation of 12 UHF television stations we have first hand knowledge of the importance of cable carriage. As the Commerce Committee noted in its 1990 Report and as FCC Chairman Sikes noted at the Commission's 1990 Orlando and St. Louis cable TV field hearings, cable television has become the principal delivery medium for video programming and few cable subscribers retain the ability to receive television stations over the air. Therefore, a television station that is not carried by cable systems in its market is doomed. Lack of carriage impairs the station's ability to produce programs addressing the needs and interests of its community of license. For UHF stations on the upper channels, cable carriage or the lack of cable carriage may well determine whether the station can survive. For the holders of the more than 200 outstanding television construction permits, cable carriage may determine whether their stations are actually built. The issue is preserving local broadcasting and not simply local broadcasters. As the Commerce Committee said last year, "[a]bsent must-carry and channel positioning requirements[8], the system of local over-the-air broadcasting is threatened." We agree that "in promoting localism extends to the ability of cable subscribers to access local broadcast signals".[9]

8/ HSN expresses no view on channel positioning.

9/ 1990 Report, p. 49.

HSN's owned and operated television stations are in the New York, Los Angeles, Chicago, Philadelphia, Boston, Dallas, Houston, Cleveland, Tampa, Miami, and Baltimore markets. Our television market ADIs contain 29,777,630 TV households. Cable penetration within our markets is approximately 44%. However, nearly half of these cable households are denied access to the 21 hours per week of locally produced nonentertainment and issue oriented programming aired by each of the HSN stations. The table below provides a detailed analysis of the HSN stations' public affairs programming from December 1986 through December 1990:

MARKETS	NUMBER OF ISSUES	TOTAL NUMBER OF GUESTS	GUESTS WHO ARE GOVT. OFFICIALS
Newark, NJ	1966	576	113
Smithtown, NY	748	644	72
Boston, MA	854	1528	269
Baltimore, MD	807	857	307
Vineland, NJ	486	1611	279
Cleveland, OH	936	892	229
Aurora, IL	469	821	25
Miami, FL	531	356	41
Tampa, FL	751	700	35
Houston, TX	1122	813	93
Dallas, TX	516	786	14
Ontario, CA	1166	860	224
TOTAL	10,352	10,444	1701 (16% of Total)

This is over 2600 hours, 111 broadcast days, of issue oriented programming that does not reach millions of cable households. That is wrong.

HSN's situation is not unique. HSN helped fund the acquisition of the three television stations licensed to Blackstar Communications, Inc., a minority broadcaster. Without cable carriage commitments, Blackstar was unable to secure bank construction financing. Blackstar stations are HSN affiliates. Blackstar's Melbourne, Florida station, WBSF, serves an estimated 820,000 households, 520,000 of which subscribe to cable. Cable penetration in the Orlando market is approaching 70% which means that if WBSF is not carried on cable, it effectively is not going to be seen. WBSF currently is carried on Orlando area cable systems serving approximately 403,000 subscribers. WBSF is thus denied coverage to approximately 23% of the cabled households in the market. These households are denied access to WBSF's 21 hours weekly of locally produced nonentertainment and issue oriented programming.

Blackstar's Ann Arbor, Michigan station, WBSX, is available to only 22% of the cable households in its service area. Yet, while WBSX is the only full power commercial television allocation for Ann Arbor and Washtenaw County, Michigan, the cable systems in the market, including those in Ann Arbor, Ypsilanti, Saline, Milan, Chelsea and Dexter, do not carry WBSX, depriving their subscribers of the station's locally produced nonentertainment and issue oriented public affairs programming.

Blackstar's Salem, Oregon station, KBSP, serves a market of 740,680 TV households. Just over 390,000 homes subscribe to cable, but KBSP is carried on systems reaching only 36% of the cable households in the market; 64% of the households are denied access to KBSP and the station's 20 plus hours weekly of locally produced nonentertainment and issue oriented programming.

In 1989, another minority broadcaster, the Roberts brothers, built the first new commercial television station in St. Louis in 20 years, WHSL. The Roberts brothers could not guarantee cable carriage and, as a result, banks refused to finance construction. HSN ultimately provided the funding. Yet even though WHSL has the strongest signal in the market and produces and airs 21 hours of nonentertainment, informational, issue oriented programming, childrens' programming and public service announcements each week, it has yet to break down the barriers created by cable operators in the market. Of the approximately 1 million TV households within a 35 mile radius of the St. Louis station, 359,196 are cable households. However, WHSL is only available to 26% of the cable households. This means that WHSL and its 21 hours a week of nonentertainment and issue oriented programming is not available to 74% of the cable households. And the problem will only intensify as cable penetration in that market continues to climb.

For all local TV stations, must carry is essential if they are to compete on the same playing field as cable delivered programming, whether it's a cable network or another local TV station. But the problem is particularly acute for local TV stations that happen to be the last in the market and have a high UHF channel. These are the local broadcast stations truly at risk without must carry. In an era in which cable is the dominant video distribution medium, and carriage is totally at the whim of the cable operator, a local station does not have the opportunity to compete for audience if it is not carried by cable. Clearly, some safeguards are needed.

Point 2

HSN knows that its stations have a special obligation to serve their local communities; to provide programming to address the communities' needs and interests. That special obligation as a broadcaster is, in fact, a statutory obligation imposed by the 1934 Communications Act.

The 1934 Communications Act provides for a national system of local television broadcast stations and obligates those stations to serve their communities of license. Specifically, Section 307(b) of the Communications Act provides:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

As a result, Congress has given the FCC a statutory obligation to make television service available, so far as possible, through the FCC licensing process to all people of the United States on a fair, efficient and equitable basis, which in the reality of today's video market can only be accomplished by must carry.

In the age of cable, only a must carry rule can further the government's legitimate and substantial interest in fostering a free local over-the-air television broadcast system accountable to the local communities. Television broadcasters have this statutory obligation to provide programming to serve their service area communities. Cable does not bear this same federal obligation. It is a technological bottleneck with little or no program accountability to the public. HSN, therefore, agrees with the

Commerce Committee that "absent legislative action, the free local off-air broadcast system is endangered thereby threatening diversity of choice not only for cable subscribers, but also for those who do not subscribe to cable."[10] There is, thus, a substantial federal interest in protecting the integrity of the FCC's TV Table of Allotments and ensuring access to stations that have a statutory obligation to serve their communities.[11] The American system of free community-oriented television is worth preserving and fostering. Failure to act will enhance the cable industry's ability to disrupt for its private gain the FCC's carefully balanced national allocation of TV stations.

Broadcast localism is a cornerstone of our television system and the Supreme Court has recognized localism as a substantial government interest.[12] Maintaining the integrity of the FCC's television spectrum allocation scheme and licensees' longstanding statutory obligation to provide local programming fully justifies a must-carry rule. As Senator Danforth has noted:

> If the Commission acquiesces to circumstances that bestow gatekeeper status upon cable systems, this will conflict with three longstanding, substantial government interests -- the public's First Amendment right to access to diverse sources

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[10] Id. at 32.

[11] See, generally, 1990 Report, p. 49 citing First Report and Order, CATV Rules, 38 FCC 683, 705 (1965).

[12] Capital Cities Cable Inc., v. Crisp, 104 S. Ct. 2694, 2708 (1984). See also National Association of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

> of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets.

See, e.g., Letter from Honorable John C. Danforth, Chairman, Committee on Commerce, Science and Transportation, to FCC Chairman Mark S. Fowler on July 22, 1986, at page 4.

Throughout its broadcast deregulatory efforts, the FCC consistently emphasized a licensee's continuing local nonentertainment programming obligation. Radio Deregulation, 84 F.C.C.2d 968, 977 (1981); Television Deregulation, 98 F.C.C.2d 1076, 1091-92 (1984), reconsideration denied, 104 F.C.C.2d 357 (1986). Both the FCC and the Court of Appeals regard this obligation as arising from Section 307(b). Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 207, (D.C. Cir. 1956) cert denied, 76 S. Ct. 650 (1956); UCC v. FCC, 707 F.2d 1413, 1429, n. 46 (D.C. Cir. 1983).

The ability of viewers to have access to local broadcast programming is an important component of Section 307(b). Because broadcasters are obligated by statute to serve their local communities, it is incumbent upon Congress and the FCC to ensure those signals are, in fact, accessible. The legislative imposition of a must carry rule based on promoting substantial governmental interests and premised on the findings of S. 12 is a constitutional means to ensure such access for local television broadcasting and, in the process, promote full compliance with Section 307(b) of the Communications Act.

Point 3

HSN believes that must carry legislation premised on the local television stations' Section 307 nonentertainment and issue oriented programming responsibilities provides a sound legal basis that would pass judicial muster. Broadcasters want fair access to our communities of licenses that reflects that cable is the gatekeeper to the home. We believe that a television station which provides a significant amount of local nonentertainment and issue oriented programming to its community should be carried by every cable system within the station's 50 mile radius. To me this appears to be a logical extension of Section 307(b) of the Communications Act and of our viewers' First Amendment rights.

A tie-in between local programming and cable carriage is good public policy and is consistent not only with First Amendment principles but with the FCC's television deregulation decision. That decision stressed licensee flexibility and discretion in responding to the needs of its community "in view of the continuing obligation of all licensees to contribute issue-responsive programming...." Television Deregulation, supra at 1088. Issue oriented programming remains the bedrock obligation of television broadcasters. It follows, therefore, that all people within a television station's licensed service area should have access to the station's local issue oriented and nonentertainment programming. In today's video marketplace this can only be accomplished via guaranteed cable carriage.

ANTIDISCRIMINATION

Among the findings of S. 12 and the conclusions of the 1990 Report is that the cable industry is now highly concentrated and increasingly vertically integrated with cable operators and programmers often having common ownership. "As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for non-cable-affiliated programmers to secure carriage on cable systems." Section 2(7) of S. 12. This has certainly been true for HSN.

HSN is the pioneer in video marketing. It is the major independent home shopping programmer. It is unaffiliated with any cable operator. The nation's largest cable operator, TCI, has financial interests in numerous programming services including QVC Network, Inc.[13/] QVC is the largest competitor to HSN.

HSN provides its programming to cable system operators via the HSN 1 network. HSN's programming, the "Home Shopping Club", is aired on cable systems under the terms of non-exclusive affiliation agreements between HSN and cable system operators. Under these agreements, HSN pays a cable system a 5% commission on sales revenues as well as direct payments for advertising support in exchange for carriage. Commission and other payments by HSN to cable operators exceeded $25 million in 1990.

A vertically integrated cable company such as TCI owns both the programming and the distribution system. As a result of this vertical integration, HSN

13/ 1990 Report, p. 22.

has been singularly unsuccessful in securing or maintaining carriage for either its cable or broadcast programming on TCI owned or controlled cable systems. TCI systematically refuses to carry HSN 1 or HSN broadcast affiliates on its cable systems opting instead to carry QVC. TCI's ownership interest in QVC is the reason TCI refuses to initiate, renew or extend HSN's affiliation agreements with cable systems owned or purchased by TCI. The following examples typify TCI's refusal to carry HSN on TCI's cable systems:

- In September 1987, TCI's cable system in Portland, Oregon and the nearby communities of Albany, Lebanon and Newberg, Oregon dropped HSN at the direction of TCI's corporate management and now carries QVC.
- The TCI system in Englewood, Colorado dropped HSN's satellite program in October 1987, and now blacks out HSN's UHF signal. The general manager of that TCI system has told HSN that he cannot carry HSN because it competes with TCI's home shopping program.
- TCI's cable system in Freemont, California does not carry HSN, but carries QVC. When approached by HSN on April 25, 1990, regarding a possible affiliation agreement, TCI's state manager for California informed HSN that there is "no way" TCI could carry

HSN due to TCI's affiliation with QVC and that TCI could carry HSN only if TCI had an equity interest in HSN.

- The TCI affiliates in Scottsdale, Arizona and Perryton and Corpus Christi, Texas have dropped HSN. The local managers of those systems have stated that, despite local preferences for HSN, TCI instructed them to drop HSN in favor of TCI's home shopping program. TCI also cancelled HSN's carriage arrangements with TCI systems in Pittsburgh, Pennsylvania and Kearney, Nebraska.
- In New York City, HSN has had considerable success in obtaining carriage on the cable systems owned by Time-Warner/ATC, Cablevision and Paragon. By contrast, HSN is not carried on any part of the New York City cable system owed by TKR Cable, which is indirectly owned by TCI. Also, in June 1987, TKR dropped HSN from its cable system in Long Beach, New Jersey.

TCI's frequent refusal to deal with HSN is evident from TCI's history of removing HSN from certain cable systems after they were acquired by TCI. The following examples illustrate HSN's difficulties in maintaining carriage with a cable system after TCI acquires that system:

- In 1987, TCI purchased Miami Cablevision ("Miami"), a group of cable systems serving approximately 110,000 subscribers in Miami, Florida. Prior to that acquisition, Miami entered into an affiliation agreement with HSN. When that agreement expired in 1989, TCI refused to renew it although HSN is still carried by Miami.

- In 1988, TCI acquired Gulfstream Cable which owned the two cable systems serving Pasco County, Florida. In October 1988, at TCI's direction, Gulfstream dropped HSN even though HSN's contract for one of those systems was still in effect. Gulfstream replaced HSN-1 and HSN-2 with its own shopping channel and TNT, an entertainment network in which TCI has an equity interest.
- In 1988, TCI acquired Heritage Communications which operates a cable system covering part of Dallas, Texas. The Heritage system in Dallas had carried HSN. In June 1989, TCI refused to renew the HSN contract for Dallas although TCI still carries HSN-2 on that system as required by its franchise agreement.
- The President of Taft Cable informed HSN on November 16, 1988 that he would have preferred to carry HSN on his cable system but that TCI, which was acquiring Taft, had directed Taft to carry TCI's shopping channel. He explained that TCI intended for its channel to "win" against the competing programs. Two days earlier the Taft President said that "Our primary responsibility is to carry [the TCI shopping channel] full-time on all of our systems."
- HSN met with the general manager of the Taft cable system in Battle Creek, Michigan on November 17, 1988. The general

manager informed HSN that, in light of TCI's pending acquisition of that system, he probably could not carry HSN, despite recognizing that HSN was financially more attractive than the TCI-affiliated shopping program then being carried on that system.

- HSN appeared on the newly developed Amps system in West Galveston, Texas as of May 1989. Shortly thereafter, TCI acquired that system and, in November 1989, replaced HSN with QVC in West Galveston.
- Suburban Cable traditionally carried HSN on its cable systems in Lancaster and Wallingford, Pennsylvania. In June 1989, Lenfest Communications, Inc., acquired Suburban Cable. TCI has a 48% ownership interest in Lenfest. In December 1989, Lenfest dropped HSN from those two systems and, to date, HSN's efforts to renew the earlier affiliation agreements have failed. The Lancaster and Wallingford systems now carry TCI's program, QVC, despite Lenfest's acknowledgement that HSN pays higher cable system commissions that QVC. HSN is not currently carried on any of the Lenfest cable systems.
- In January 1990 TCI acquired some of the vast cable systems owned by Jack Kent Cooke, including some cable systems in Oregon. Although HSN still appears on those Oregon systems, TCI has

allowed the affiliation agreements to expire and HSN has not been able to renegotiate those agreements.

- HSN historically had been carried on Temple Cable's system in Stigler, Oklahoma. TCI recently acquired that system. Although that system's manager has expressed a desire to continue carrying HSN, TCI informed HSN that it would be dropped from that system as of July 31, 1990.
- Americable International recently sold its two cable television systems in Lompoc and Coronado, California to TCI. Shortly thereafter, HSN was dropped from those two systems.
- On May 9, 1990, TCI's counsel wrote HSN that TCI was acquiring certain cable systems of First Ameri-Cable Corp. located in Ohio, Kentucky, Nevada, Florida and Alabama. TCI's letter emphasized that "TCI considers itself in no way obligated under any agreement [HSN has] or may have with [First Ameri-Cable]."

If TCI were merely one of many cable systems, this pattern might not be particularly serious. However, the Commerce Committee's Report noted that as of the end of 1989 TCI owned or controlled directly or indirectly cable systems serving more than 12 million subscribers or about 24% of total cable subscribers.[14] This market power combined with its investment in a competitive programming service, has given

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[14] Id. at 37

TCI the incentive and ability to favor QVC over HSN and, generally, to refuse to carry HSN on its systems.

The combination of horizontal and vertical integration means, in the words of one Committee witness last year that "you don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the programming services in which he has an equity interest... and to the disadvantage of those services, including local independent broadcasting stations, in which he does not have an equity position".[15/] This is precisely what has happened to HSN and what prompted the company to turn to over-the-air broadcasting as a way to breach this unfair road block and reach its audience. But, as explained above, HSN has been significantly stymied in that effort by the lack of a must carry provision mandating the carriage of local full power television stations.

For these reasons, therefore, HSN strongly endorses Section 6 of S. 12 which would prohibit cable operators from favoring their affiliated programmers or discriminating against unaffiliated programmers such as HSN. This is a measured and reasonable response to a clearly documented pattern of vertical integration abuse by cable operators.

[15/] Id. at 23-24.

CONCLUSION

HSN urges the Committee on Commerce, Science and Transportation to promptly report to the Senate a cable bill that will insure competition in the video marketplace. HSN believes that the carefully crafted antidiscrimination and must carry provisions of S. 12 will accomplish that result and, therefore HSN strongly supports that legislation.

Thank you.

Telecommunications Industry Association

POSITION ON S. 12, THE CABLE TELEVISION CONSUMER PROTECTION ACT OF 1991

before the
Subcommittee on Communications
Committee on Commerce, Science and Transportation

April 8, 1991

Thank you for the opportunity to present the Telecommunications Industry Association's (TIA) views on a very important issue -- that is, how public policy influences the rate at which new technology will be deployed into our Nation's communications infrastructure. This is an important issue because the ability to move massive amounts of information quickly, inexpensively and ubiquitously will prove invaluable in the Information Age. Widespread deployment of fiber optics will be necessary to provide this capability.

The Telecommunications Industry Association (TIA) is a membership organization representing over 500 manufacturers of telecommunications equipment. TIA's Fiber Optics Division represents 98 manufacturers of fiber optic systems and components used by both cable television system operators and telephone companies. TIA members provide components used by both the satellite and broadcast industries as well.

TIA has watched the debate on cable reregulation closely with an eye toward assessing the impact of proposed legislation on the pace of advanced technology deployment and development of new services. Our comments here on S. 12 are limited to issues related to reregulation of rates for basic services, and the impact this might have on the adoption of new network and transmission technologies.

TIA is opposed to S. 12 because of unintended adverse effects it will have on technology and innovation. Specifically, this bill will slow the rate of fiber optic technology deployment by both telephone companies and cable television companies.

Adverse consequences of S. 12 include:

1) reduced incentives for cable television companies to invest in technologies such as fiber optics, a technology which could enhance cable television quality and expand service capabilities; and

2) increased disincentives for telephone companies to invest in expeditious deployment of fiber optics in the local subscriber loop, a technology which could enable a range of one-way and two-way switched video services to schools, small businesses and homes.

At TIA, we fear that in an effort to respond to short-term cable television concerns, the Congress may enact laws such as S. 12 that will have the unintended adverse effect of retarding the deployment of fiber optic technology in the subscriber loop. This would deprive schools, small businesses and homes of the benefits of an advanced communications infrastructure. S. 12 will have a negative impact on our national welfare because the deployment of an advanced telecommunications infrastructure is essential to our long term national productivity and prosperity as we compete in the Information Age.

We are also concerned that the enactment of S. 12 could be viewed as having "solved" all outstanding cable television and telco issues. The U.S. has, in effect, a communications policy that discourages experimentation with new technology by network service providers and their suppliers, creates bias against fiber optics, and delays realization of the benefits of switched broadband services. S. 12 endorses the unsatisfactory status quo.

A far better approach than reregulation to meeting the goals of S. 12 would be to permit competition in video services by allowing limited telephone company participation. This would encourage innovation, accelerate deployment of new technologies and expand service offerings by both cable television and telephone companies. Consumers would benefit more from competition than reregulation. Also, competition disciplines the marketplace. Potential abuses of market power in the provision of video services, if any, would be curbed by the presence or the prospect of alternative sources of supply.

We therefore urge the Committee to take into account the impact on technology and new services of this legislation, and reject rate regulation approaches for the cable television industry.

I. Reregulation of cable rates would deter investment in new video technologies to the detriment of the public

TIA is convinced that, in a regulated environment envisioned in S. 12, cable companies will be less inclined to invest in their networks generally, and specifically in new transmission technologies such as fiber optics. This negative impact on cable investment will arise from a fear that passing the cost of these investments on to subscribers would result in "unreasonable" rate increases that are are prohibited in Section 5 of the bill.

Rate regulation can be expected to have an unfavorable impact on the incentives of cable operators to make investments. Under rate regulation, prudent cable operators would avoid some types of investments -- including some investments with the same risk/reward profile that operators were willing to undertake in a deregulated environment. Investments in system upgrades or new technologies such as fiber optics will likely be the first investments to be cut under rate regulation. Quality will suffer and technology will stagnate.

A. Cable television investment levels are sensitive to legislative/regulatory policies

Rate regulation's negative impact on investment levels is already well understood for the cable television industry:

- TIA members with cable sales observed that the rate regulation environment in effect prior to December 1986 (effective date of The Cable Communications Policy Act of 1984 -- the "Cable Act") deterred equipment purchases. Conversely, with deregulation, investment in new technologies increased materially.

- These forces are still at work, as demonstrated by the negative impact on cable investment that the threat of reregulation had in 1990. With this threat, cable capital expenditures fell by $268 million, or down 13% from the previous year. This decline followed a trend of double digit increases since deregulation.[1]

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[1] Cablevision, various issues.

One could argue whether management decision-making and risk aversion or the cost and availability of capital cause these swings in investment levels with changes in regulatory policy, but it really does not matter since rate regulation is the root cause. The conclusion: rate regulation hurts investment levels in the cable television industry.

B. Legislation such as S. 12 that discourages cable television investments in technology is particularly untimely

Stifling cable industry investment now could be particularly damaging in the long run. With 90% of U.S. homes already passed by cable, market saturation could soon be a financial problem if the industry's hands are tied with regulation. Growth in revenues from premium channels (such as Showtime, HBO, etc.) has already fallen dramatically in the past few years.[2] The industry needs to exploit other opportunities for long term maintenance of its cash flow. Technology investments could be crucial to rejuvenating revenue growth through new industry services.

Reducing cable investment incentives through regulation will be particularly destructive to advanced technology deployment. The cable television industry is just beginning to invest in fiber optics. Just in the last year or so the industry has begun to understand that fiber technology can transform a cable network from a "video store with wires" into a credible supplier of communication services. It would be unfortunate if regulation under S. 12 blocks such innovation and renewal.

II. S. 12 unfortunately endorses the current disincentives for telephone company investment in video-based technologies like fiber optics

TIA believes that the second major flaw in S. 12 from a technology deployment perspective is its failure to eliminate the current disincentives in the Cable Act on telephone company investment in video-based technologies like fiber optics.

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[2] NCTA, October 1990.

A. Telephone companies are restricted from offering services that would expedite economic prove-in for fiber-based broadband services. These restrictions discourage advanced infrastructure investments that are economic today

Current provisions in the Cable Act discourage telephone companies from investing in fiber optics technology. For example, these provisions restrict who can provide various services. These restrictions have created significant disincentives to telephone companies for deploying fiber in the local loop expeditiously, even for voice-only applications. Because telephone companies have little or no prospect now of using fiber's broadband (video) capabilities in the local loop, many telcos have only minimal interest in deploying such technology expeditiously in the local loop.

The video restrictions include:

1) the prohibition of telephone company video programming; and

2) the treatment of the local franchise requirement in the Cable Act as, in effect, an exclusive license to provide video programming, thus blocking others from participation in video.

These restrictions prevent telephone companies from delivering the one service -- video -- that uses the unique information carrying capacity of fiber optics and that can economically justify its deployment.

TIA has examined in detail the economics of fiber in the local loop.[3] As was explained in testimony presented by TIA to the Senate Subcommittee on Communications last July, vendors have cost effective fiber systems available today for the provision of narrowband (voice and data) service. Many of the newer systems lower the per subscriber costs by sharing expensive optoelectronics, and by deploying fiber only to the curb and not all the way to the home. Yet, these cost-effective narrowband systems are not being deployed expeditiously in the marketplace. (Higher cost is inhibiting the deployment of fiber all-the-way-to-the-home broadband systems for voice, data and *video*.)

TIA has previously referred to this paradox between favorable narrowband economics and slow deployment by saying that "fiber is stalled on the way to the home." We believe that the reluctance of telephone companies to embrace these narrowband systems is driven by the uncertainty over the outcome of the debate on telephone company entry into video programming. In light of the uncertainly about ever being able to provide video programming, it appears that many telephone companies are taking a "wait and see" attitude with respect to fiber for residential and small business end users.

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[3] An Assessment of Fiber-to-the Subscriber Economics: Stalled On the Way to the Home. A Working Paper Prepared for the Telecommunications Industry Association by Hal Selander of Braxton Associates, June 4, 1990. This paper appears in the Appendix of these comments.

A policy change is need to break this technology logjam. However, S. 12 gives neither consumers nor telephone companies any reasonable prospects for breaking this logjam because the bill maintains the existing restrictions on video services. It instead reinforces the disincentives.

B. Reregulation now of cable rates will block policy actions favoring competition in video services

The failure to address these restrictions in the first Congressional reconsideration of the Cable Act reaffirms them. With the passage of S. 12, the Congress will have endorsed a bifurcated telecommunications network, with the cable industry providing one-way video entertainment and the telephone companies delivering two-way voice service. While this may have made sense in the past, the original rationale behind separation is no longer applicable.

By endorsing these restrictions, Congress will certainly delay the development of an advanced communications network capable of delivering a range of new two-way, high capacity services that will be essential to our long term national prosperity. This delay could cause the U.S. to slip from a leadership position in telecommunications technology and services.

C. The benefits of fiber-based services to the Nation's competitiveness and to consumers will be delayed beyond reason

As the U.S. continues to move toward an information/services-based economy, today's local exchange carrier networks will increasingly constrain residential and small business users' ability to participate in the Information Age. Many Americans now work at home, unable to effectively access the services, the customers or the suppliers that large companies access. While large companies can enhance their productivity and competitiveness by bypassing the local network, their work-at-home employees will face the same limitations of the public switched network.

With disincentives for both cable television and telcos, who will build the network and develop and provide all the new two-way services that will prove essential to our economic prosperity as we proceed further into the Information Age? How long should consumers be willing to wait?

- How and when will the 40 - 50 million personal computers in our nation be interconnected to tap the productivity and unleash the creativity of the new generation of computer users?
- How and when will our schools located in rich or poor, urban or remote neighborhoods be interconnected to centers of learning excellence, thus benefitting from distance learning techniques?
- How will the almost 35 million Americans[4] who prefer to or must work at home gain productive access to their offices or to their factories?

Through fiber optic technology upgrades to the telecommunications infrastructure, we can stimulate economic development in depressed areas, and with widespread fiber deployment we can increase our overall competitiveness as a nation. We can also assist in advancing the public policy agenda, using technology to catalyze excellence in education as well as improved quality and cost effectiveness of health care delivery. Although now limited by the network, experiments in distance learning enable the advanced or remedial student to participate in remote classrooms. An advanced network could enable image-based home medical diagnostics or link by wire patient and medical expertise. A fiber-based network is the cost-effective technology critical to achieving these goals by delivering all these services on one wire.

However, through well-meaning policies, we have restricted consumers' access to such services. TIA fears that absent competition, these new interactive or two-way services will not be provided because they require an advanced network that neither the cable television industry nor the telephone industry is likely to build under existing limits on competition.

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[4] LINK Resources Corporation, August 16, 1990.

III. Competition (or the threat of competition) provides a great incentive for technology innovation and service development, and an effective deterrent to alleged abusive industry practices

TIA believes that competition is the best model for stimulating innovation, accelerating the deployment of new technology and encouraging the development of new two-way services.

Without competition, entrenched firms are more likely to delay introduction of new technology. Rate regulation brings with it its own set of accounting incentives/disincentives regarding the replacement of existing assets and the development of new sources of revenue. Basic business strategies for private sector growth such as investment spending or forward pricing are often limited, if not outlawed. Too often rate regulation degenerates into a system where non-stakeholders (regulators and politicians) have more influence than stakeholders (customers, employees and shareholders) in a firm's investment decisions.

A. Competition encourages investment

TIA's view on competition is based on many years of experience in telecommunications, during which increasing levels of competition were allowed and technology advanced at no cost to subscribers.

Our confidence in the competitive model is further supported by market experience in long distance telephone services. Although fiber technology was invented in 1970, and went to fiber trials soon thereafter, the first commercially significant order was not place until 1983. That order was place by MCI. It is significant that a commitment to fiber technology was made only after the long distance market was transformed from a monopoly to a competitive market.

More recent experiences in the interexchange market are also enlightening. To improve their competitive positions, carriers have rushed to install high capacity, digital, fiber-based networks. In 1987, U.S. Sprint made the decision to provide a nationwide all-fiber network as a strategic marketing move, abandoning its existing microwave networks. Mass market advertising broadcasted the benefits of the new technology to consumers. AT & T responded in 1988 by accelerating the digitalization of its networks, writing off

$6.7 billion of analog equipment.[5] MCI responded in 1990 by taking a $550 million write-off of analog equipment as part of an accelerated digitalization effort.[6] With deregulation, the technology change and investment decisions in this market have been remarkable.

B. Failure to adopt a competition-based approach will have negative effects on consumers and the Nation

TIA believes that the failure of S.12 to promote competition instead of the regulating rates as proposed will have long term negative impact on consumers and the Nation.

S. 12's short-term or piecemeal approach to communications policy also raises concerns over possible consequences to U.S. economic development and vitality. For example, most futurists from Alvin Toffler to George Gilder agree that a two-way broadband communications network will prove essential to the growth of industrial economies. Our competitors, particularly Japan, know this and are taking action right now to bring fiber optics to every school, small business and home. Japan's NTT plans to have its entire nation wired with fiber optics by 2015. No such plan exists in the United States, nor will it be possible for the private sector to respond to these challenges with the continued restrictions and disincentives of S. 12.

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[5] AT & T Annual Report, 1988.

[6] The Washington Post, February 1, 1990.

C. Competition-based approaches can meet the goals of S. 12

However, competition-based approaches can meet the bill's goals outlined in Section 3. To introduce competition into S. 12, TIA believes that the bill should:

1) authorize telephone companies to build two-way, broadband distribution systems and offer transport on such systems on a common carrier basis;

2) waive the local franchise requirement for telephone companies and video programmers using the telephone company transport; and

3) ease the prohibition on telephone company provision of video programming.

IV. Conclusions

TIA fears that in an effort to respond to short-term cable television concerns, the Congress may adopt laws such as S. 12 that will have the unintended effect of retarding the deployment of fiber optic technology, thus depriving homes, schools and small businesses of the benefits of an advanced communications infrastructure. Both telephone and cable television network providers will be discouraged from making investments by the rate regulation approach of this legislation. We are also concerned that S. 12 could be viewed as having "solved" all outstanding cable television and telco issues. S. 12 unfortunately endorses a communications policy that discourages experimentation with new technology, creates bias against fiber optics, and delays realization of the benefits of switched broadband services.

Permitting competition in video services by allowing limited telephone company participation would benefit consumers and encourage innovation and deployment of new technologies such as fiber optics, both in cable television as well as telephone company networks.

TIA would like to thank the Committee for this opportunity to present our views. We hope the Committee shares the view that competition is a better solution to the problems the bill seeks to address than the rate regulation proposed in the bill. We therefore urge the Committee to take into account the impact on technology and new services of this legislation, and amend S.12 to make it pro-technology by adopting a competitive solution rather than a rate regulation solution.

Respectfully submitted,

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28655

March 6, 1991

The Honorable Albert Gore
United States Senate
393 Russell Building
Washington, DC 20510

Dear Senator Gore:

In advance let me express the thanks of the City of Morganton for your taking the time to read and consider this letter and the materials attached to this letter. Quite frankly, our community of 15,000 people is in the throes of a political campaign that threatens to divide citizen against citizen and set back local government dozens of years. Unfortunately, the political campaign is not candidate against candidate but is an effort by a billion dollar corporation to run rough shod over our town in any manner they deem appropriate. Specifically, I refer to Telecommunications, Inc. (known locally as TCI or Madison) and our six (6) year legal battle.

The material attached to this letter briefly outlines our struggle. We hope that Congress will seriously consider reasonable regulation of the cable TV industry. The Cable Act of 1984 is a disaster. While the facts of our struggle are but a single example of cable TV problems encountered by local governments, we believe that the same type of thing has happened in many other communities. In simple truth, the same thing did happen in Jefferson City, Missouri and by coincidence did involve TCI there also.

Beyond considering reasonable regulations for the cable TV industry, we also solicit your help in our particular struggle. We don't know what help or encouragement you can offer Morganton.

If the information set forth in our material causes you to be curious, I will be glad to make available any of our City staff to provide even greater details about what is occurring in Morganton. Generally, local government can and ought to look after itself without running to Washington each time something occurs. Practically speaking, local governments cannot survive in cable TV matters unless the playing field in made level.

Unless someone serves as a watchdog over cable TV matters, the events that happened in Jefferson City, Missouri, a few years ago and the events now happening in Morganton will continue. The Cable Act of 1984, while it was designed to offer protection to private cable operators, also was intended to cause cable companies to become responsible corporate citizens. The Cable Act entrusted local governments with a major role by continuing the franchising process. The Cable Act even acknowledged that local governments had a role to play in owning and operating cable TV systems.

In Morganton, TCI has sought to avoid its responsibilities under the Cable Act and has blatantly disregarded its contractual obligations. Furthermore, TCI has now thrust itself into the political life of this community.

In short, the highlights are:

> In 1985, Morganton refused to renew TCI's franchise for many reasons, including poor service, the failure to acknowledge responsibility under the franchising process, the failure to make candid disclosures about past problems, and the failure to offer to build a modern cable TV system.
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> . . .
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> In January of 1986, TCI filed a $35,000,000.00 lawsuit against Morganton in Federal Court. TCI lost the lawsuit and then appealed to the Fourth Circuit Court of Appeals. That case is still pending although oral arguments have been heard.
>
> . . .
>
> TCI filed a lawsuit against Morganton in the State Courts seeking a determination of certain local issues. TCI lost that case at both the Trial Court level and ultimately in the Supreme Court of North Carolina.
>
> . . .
>
> In February 1991, TCI hired a political consultant and began a petition drive to call for a referendum on cable TV matters in Morganton. A full time political consultant assumed residency in Morganton and numerous staff people and canvassers were hired.
>
> . . .
>
> TCI employees began circulating a petition, seeking signatures of registered voters, by telling registered voters that there would be an interruption of cable TV service if they didn't sign the petition and by telling voters that property taxes were going to be increased by the City of Morganton if they didn't sign the petition. Both facts are false.
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> . . .
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> TCI began an extensive advertising campaign utilizing direct mailings, newspaper ads and radio ads to attack the local City Council by alleging that the local officials were lying about the use of tax dollars. Additionally, the ads allege that the City Council will control the TV programs that are seen in the City of Morganton, even though Federal law prohibits local governments from making those decisions.

The materials attached to this letter give greater detail about the events in Morganton. TCI has decided that if it cannot win in the Courts, it will win through the political process. A small town has no effective defense against the spending power of a billion dollar corporation and its ability to misuse the facts, scare voters with outlandish lies and deceptive conduct.

It doesn't seem to matter to TCI that the people's trust in its local government is being destroyed. TCI's win at any cost attitude may very well prevail but in the process, the Cable Act has been trampled, local elected officials are intimidated and local government destroyed.

No one disputes the notion that the citizens ought to be allowed to vote on certain issues. The entire process becomes corrupt, however, if major corporations can buy such elections with its enormous profits.

Nor does the City of Morganton dispute the notion that competition is healthy. The simple fact is that there is no competition in the cable TV industry. Private cable companies simply do not compete against each other. In fact, TCI has told the City of Morganton that competition in the cable TV industry is not feasible. First of all, the telephone poles will not support multiple systems because there is no room. Secondly, in small communities, the subscriber (customer) base will not economically support competition.

Something must be done.

Respectfully,

Mel L. Cohen
Mayor

MLC/dbo

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

March 13, 1991

Honorable Ernest F. Hollings
Chairman, Committee on Commerce
Science and Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Mr. Chairman:

We are writing to inform you of the Administration's views on S.12, the Cable Television Consumer Protection Act of 1991.

As you know, last year the Administration strongly opposed proposals to re-regulate the cable television industry then pending in Congress, including S.1880. Because S.12 is similar in all material respects to S.1880, the Administration strongly opposes S.12 as well.

Our principal objection to S.12 is that the bill, like its predecessor, does not sufficiently emphasize competitive principles in addressing perceived problems in the cable television industry. It has been the Administration's consistent position that competition, rather than regulation, creates the most substantial benefits for consumers and the greatest opportunities for American industry. We think that Congress can best serve television viewers by removing barriers to entry by new firms into the video services marketplace. The Administration therefore supports removal of current legislative prohibitions against telephone company provision of video programming.

Moreover, the Administration supports legislation barring franchising authorities from unreasonably refusing to award a second cable franchise. Such a provision will remove an existing barrier to entry by competing providers of video service to the home.

The Administration also objects to S.12 because it would greatly expand Federal regulation of cable rates. Such action would both hamper the development of new products and services for cable subscribers and slow the expansion of cable service to areas not now served. The Administration believes that, until competition is fully established, regulation of cable rates should continue to be governed by the framework laid out in the 1984 Cable Act, rather than by new and inflexible legislation. That is, regulation should occur only when a cable system does not face "effective competition," as defined by the Federal Communications Commission ("FCC"). As you know, the FCC has a pending rulemaking in which it proposes to revise the existing "effective competition" standard. In comments to the FCC, both the Department of Commerce and the Department of Justice have proposed new standards that, while increasing the number of cable systems subject to rate regulation, would avoid the inflexible re-regulation that S.12 would impose on the cable industry.

The Administration also opposes the provisions of S.12 that would restrict the discretion of cable programmers in distributing their product. These provisions ignore the reality that exclusive distribution arrangements are common in the entertainment industry and encourage the risk-taking needed to develop new programming. Requiring programming networks that are commonly owned with cable systems to make their product available to competing distributors could undermine the incentives of cable operators to invest in developing new programming services, to the long-term detriment of the American public. If competitive problems emerge in this area, they can and should be addressed under the existing antitrust laws.

Finally, S.12 would require cable operators to carry the signals of certain television stations, regardless of whether the cable operator believes that the stations are appropriate for inclusion in its package of services, and regardless of whether such inclusion reflects the desires and tastes of cable subscribers. The Administration believes that such "must carry" requirements would raise serious First Amendment questions by infringing upon the editorial discretion exercised by cable operators in their selection of programming.

The Administration is well aware of the widespread concerns about the structure and performance of the cable television industry. The task for policymakers is to address these concerns in a way that does not jeopardize the substantial benefits that the cable industry has produced for consumers since passage of the 1984 Cable Act. The Administration is convinced that this task can best be accomplished by the expansion of competition in the video services marketplace and appropriate rulemaking by the FCC, rather than by the comprehensive re-regulation of the cable industry contemplated by S.12.

We have been advised by the Office of Management and Budget that there is no objection to the submission of these views to the Congress, from the standpoint of the legislative program of the President.

Sincerely,

Robert A. Mosbacher
Secretary of Commerce

James F. Rill
Assistant Attorney General,
Antitrust Division
Department of Justice

COMPETITIVE CABLE ASSOCIATION

March 13, 1991

The Honorable Ernest F. Hollings
United States Senate
Washington, D.C. 20510

Dear Senator Hollings:

It is reported that the National League of Cities and other municipal organizations, all represented by the law firm of Arnold & Porter, are urging the passage of S.12 to reregulate cable television. These are the very same interests that stand at the gate and exclude competition by the franchise practice of authorizing only one operator per franchise area.

The Competitive Cable Association, whose members are in the trenches operating second, or competing cable systems, knows that the perceived abuses in the delivery of cable services are directly attributable to the monopoly position enjoyed by existing cable operators in most places in the nation. And that monopoly status is underwritten and guaranteed by the very same municipal interests that now urge that new regulation is needed because cable is a monopoly. In short, these municipal interests have created the monopoly and now use that as an excuse to extend their regulatory powers.

The quick and certain rebuttal is that competition will restrain subscriber rates and induce to improved cable service. That competition can only meaningfully surface if these municipal interests can be compelled to get out of the way and to allow open entry into the cable business. The Competitive Cable Association has urged such a proposal on the FCC. The enclosed copy of the Association's response to the municipal interests that are the cause of cable's difficulties will, it is respectfully submitted, supply a truer insight into what's really afoot in cable television.

Once the municipal bars are lifted, the other obstacles to competitive cable can be addressed. Those can be briefly identified as gaining access to the programming of the principal cable networks, an outlawing of the customary local requirement that the entire franchise area be wired (a condition in local franchising that is designed to discourage competing cable operations), and a curbing of predatory pricing, a practice in which the first operator sets excessively low prices in the compete area only, the purpose of which is to drive out competition.

Members and/or officers of the Competitive Cable Association are available to testify in support of these positions.

Yours truly,

Sol Schildhause

Sol Schildhause
Counsel to Competitive Cable
Association

March 13, 1991

The Honorable Daniel K. Inouye
United States Senate
Washington, DC 20510

Dear Senator Inouye:

I am writing on behalf of our member public television stations to express strong support for Section 615, "Carriage of Noncommercial Educational Television Signals," of S. 12, the "Cable Television Consumer Protection Act of 1991."

As S. 12 recognizes, the Federal Government has a substantial interest in ensuring that this Nation's citizens have access to the educational and informational services offered by public television stations. Public television is a local community institution supported in major part by local tax dollars and voluntary citizen contributions. Absent mandatory cable carriage requirements, there is a substantial likelihood that citizens who have supported local public television services will be deprived of those services. The public television carriage requirement contained in Section 615, which reflects an agreement reached last year between the National Cable Television Association and America's Public Television Stations, will ensure that these citizens have access to this local public institution which they support.

We are aware that some broadcast organizations may be suggesting legislation that would impose a retransmission consent requirement on cable operators. This would enable broadcast stations (that cable operators would choose to carry) to negotiate terms and conditions of carriage of the broadcast signal. We understand that such a proposal is being paired with a proposal for modified leased access requirements which would enable stations (that cable operators would not choose to carry) to gain access to cable systems by paying the cable systems rates determined by Congress or the FCC to be reasonable.

While retransmission consent/leased access proposals may be appropriate for commercial broadcasters, a commercial negotiation is not an appropriate mechanism for assuring access to public television services. Public television services, which have been funded by tax sources, are intended to be universally available because of their essential public service value. Public television stations have always sought to expand access to public television services, not to deny or restrict their use. Moreover, public television stations should not be required to pay a fee (even a nominal fee) to obtain carriage of their publicly funded services.

THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
1350 CONNECTICUT AVENUE NW WASHINGTON DC 20036 202 887 1700 FAX 202 293 2422

The Honorable Daniel K. Inouye
March 13, 1991
Page Two

We recognize that retransmission consent offers the potential for some public television stations to obtain additional resources from cable systems. As you are well aware, public television has a critical need for additional funding. However, the additional resources that some stations may receive through negotiated carriage arrangements are not more important than universal access to all unduplicated public television services. If Congress determines that cable systems should pay broadcasters for carriage, a more appropriate way to extend that benefit to public television might be to have all cable operators pay a per subscriber monthly fee to a public television fund at the Corporation for Public Broadcasting to supplement funding available from other sources.

In any event, we urge the Senate Subcommittee on Communications to neither eliminate nor modify the noncommercial educational must carry provision currently in Section 615. Must carry for public television continues to be the preferred mechanism for furthering Congress' substantial interest in guaranteeing viewer access to public telecommunications services on cable systems. In addition, we believe that mandatory carriage on cable establishes a valuable precedent in support of our broader goal: Access for public television services on all future telecommunications distribution technologies.

We will be submitting written testimony for the record. Thank you for your consideration of our views.

Sincerely,

Connecticut Cable
Television Association, Inc.
One Liberty Square, Suite 101, New Britain, Connecticut 06051 (203) 224-9202 Fax (203) 229-9547

March 20, 1991

The Honorable Daniel K. Inouye
Chairman
Senate Communications Subcommittee
227 Senate Hart Office Building
Washington, D.C. 20510

Dear Senator Inouye:

Having watched the Senate Communications Subcommittee's hearing on C-SPAN, Saturday, I feel compelled to correct a factual error made by Sen. Joseph I. Lieberman in his testimony. His testimony also raised objections to a tier offered by his own cable system, reversing a position he took before a state agency in 1987.

First, the factual error: Sen. Lieberman stated, "Cox Cable in Hartford, for example, now has four tiers of non-premium services, but it charges consumers $20 each time they want to change tiers."

Cox does not charge customers to change tiers. It considered the imposition of a flat $20 charge to recover partial costs for dispatching a service truck to install the device necessary to provide the requested service level. While the proposed $20 charge would have been less than the company's cost, it opted against imposing any fee. Even though Cox decided against the equipment charge, such fees are common in other services. For example, the primary telephone company serving Connecticut charges $40 for the first 30 minutes, and $15 for each additional 15 minutes when making service calls.

I would point out that the system's decision to offer tiers was not a disguised rate increase. Customers paying $18.99 for the full basic service are paying the same for the re-christened "Expanded Service Package". The "broadcast" package is priced at $10.99; the next level, which also includes distant signals, $11.99; and the "limited" service package, including all broadcast, plus certain satellite services, $17.99. Because of this approach, customers now have greater control over what they pay.

Sen. Lieberman expressed objections to a "stripped down basic tier" offered by his own system. As with Cox, the price for full basic remained the same on his system, but a limited basic is now available at a $4 discount. This "limited" basic includes broadcast channels, plus some satellite services, WTBS, and the Nostalgia Channel, popular with mature viewers.

2-
The Honorable Daniel Inouye

Sen. Lieberman's objection to tiers is a reversal from his position in 1987. Testifying before the Connecticut Department of Public Utility Control, as attorney general on November 13, 1987, Sen. Lieberman said:

> Aside from naked price increases, cable companies have begun "untiering" their service offerings. Companies are, in effect, loading their basic service offerings with more and more channels, resulting in higher and higher rates.

Finally, Sen. Lieberman cited Connecticut statistics showing basic rates rose by 52 percent since 1985. Reviewing the data by year, it shows Connecticut systems raised basic rates at a 4.4 percent average since 1988.

Half the total increase since 1985 occurred in a single year, 1987, deregulation's first year when systems moved to catch up with years of artificial constraints.

In considering cable television legislation, I thought you'd appreciate having an accurate accounting. Thank you for the fairness you've shown in the past and I'd be happy to answer any questions you may have.

Sincerely,

Michael Dorfsman

Michael J. Dorfsman
Executive Director

National Cable Television Association

James P. Mooney
President &
Chief Executive Officer

1724 Massachusetts Avenue, Northwest
Washington, D.C. 20036-1969
202 775-3655

March 20, 1991

The Honorable Daniel K. Inouye
Chairman
Subcommittee on Communications
Committee on Commerce, Science, and Transportation
United States Senate
227 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I want to thank you again for your many courtesies to us as we prepared for last week's hearing, and, indeed, over the past year.

I also would like to comment on Bob Schmidt's testimony toward the end of the day. If I understand what Bob was saying, it is that multichannel microwave (i.e., "wireless cable") doesn't have any significant problem with access to cable programming, but now is focusing its legislative efforts on getting the same wholesale price as the cable operator gets.

As part of his colloquy with Senator Packwood, Bob made the point that, because of "wireless cable's" lower capital costs as compared to cable ($350 per subscriber versus $1,500 to $1,900), they currently can compete with cable at retail despite their higher programming costs, and in some instances are actually offering a lower retail price.

This is precisely the point we've been trying to make for a couple of years. If "wireless cable" is getting access to programming at a wholesale price which allows it to compete at retail with cable and make a profit, then there is no justification for governmental intervention. For the government to intervene in pricing would merely mandate that all of the extra profit which results from "wireless cable's" lower capital costs go to the "wireless cable" operator rather than to the programmer, thus settling by fiat an issue which properly ought to be bargained out by businesspeople among themselves. This is terribly unfair to the programmers, who quite properly feel that so long as they are not engaging in practices which impede competition, they should be left free to maximize the fruits of their investment, and not have the government step in and award the benefits to someone else.

Quite obviously, the programmers we represent feel very strongly about this. Please let me know if there is anything we can do to further explain the reasons for our position on this subject.

With best regards.

Sincerely,

James P. Mooney

P.S. -- The advantage arising from "wireless cable's" lower capital costs can be very substantial. If you take the low-end capital investment Bob Schmidt acknowledges as common in cable ($1,500), discount it by the "wireless cable" operator's capital cost ($350), assume very favorable terms of 70% financing amortised over twelve years at 10% annual interest, the cable operator starts with a built in cost disadvantage of $9.66 per month, per subscriber. Add to this the regulatory costs borne by cable operators, including franchise fees, which "wireless" operators are not required to pay, and the disadvantage becomes even more substantial.

JPM:rrs

Independent
Television

April 2, 1991

The Honorable Daniel K. Inouye
Chairman
Subcommittee on Communications
Committee on Commerce, Science
& Transportation
United States Senate
722 Hart Senate Office Building
Washington, DC 20510

Dear Senator Inouye:

On March 19, 1991 I testified in support of S. 12, the "Cable Television Consumer Protection Act of 1991." During the hearing there was some concern regarding continued support by the broadcast industry for the must-carry and channel positioning provisions of the bill. The question is whether the broadcast industry should continue to promote must-carry rules or whether it should suggest the adoption of a retransmission consent regime. With retransmission consent, individual television stations would negotiate with cable operators for carriage and perhaps payment.

It became apparent during the hearing that some Senators had trouble accepting a must-carry regime and a retransmission consent proposal in the same bill. In essense, we were told to choose one or the other.

INTV has been, and will continue to be, a strong supporter of must-carry and channel positioning rules. If forced to make a choice, we believe must-carry and channel positioning rules best serve the broadcast industry. Signal carriage rules should be a bedrock requirement if free-off-air television is to survive and compete with cable.

To the extent the Subcommittee believes that it cannot accomodate both must-carry rules and retransmission consent within the same legislative package, then the existing must-carry and channel positioning provisions should be retained.

Sincerely,

James B. Hedlund

James B. Hedlund
President

INTV Association of Independent Television Stations, Inc.
1200 Eighteenth St., N.W., Suite 502, Washington, D.C. 20036 • (202) 887 1970/Fax (202) 887-0950

CENTURY
COMMUNICATIONS
CORPORATION

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April 12, 1991

Senator Daniel Inouye, Chairman
Senate Subcommittee on Communications
United States Senate
Room No. 722 SHOB
Washington, DC 20510

Dear Senator Inouye:

We have reviewed the Testimony of Mayor David Adkisson of Owensboro, Kentucky presented to the U.S. Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications on Thursday March 14, 1991 during the hearing on S. 12 Cable TV Consumer Protection Act of 1991. We respectfully request that this letter of response be made part of the formal record of the hearing.

To summarize, Century Communications Corp. has operated the cable system, Owensboro on the Air, since 1984. Under our management the cable system has maintained a strong commitment to the community of Owensboro, to customer service and to providing increasing value to our subscribers. The General Manager of the system, in numerous meetings within the last several months with Mayor Adkisson or other officials, has not been advised of any of the dissatisfaction which suddenly surfaced in the Mayor's testimony of March 14, 1991. Indeed, our company has invested millions of dollars in new facilities in order to improve the technical quality of our service and to respond quickly to subscriber problems. Rates had been artificially controlled at the time we bought the system. While rates which were artificially restrained when we bought the system, have increased since enactment of the Cable Act, deregulation has allowed an almost 300 percent increase in the number of program services on the basic tier. Per channel costs to subscribers have been drastically reduced making cable in Owensboro a remarkable bargain. The subscribers in Owensboro, by and large, believe we provide good value and service and the public has recognized this value as evidenced in our increasing subscriber base. With this in mind, to say the least, we are both surprised and dismayed by Mayor Adkisson's statements regarding customer dissatisfaction with our cable system in Owensboro. Most of them have no basis in fact.

Our cable system, Owensboro on the Air has provided cable television service to the citizens of Owensboro, Kentucky since 1974. Our company, Century Communications Corp. purchased the Owensboro system in January 1984. Since our acquisition of the system we have consistently provided high quality service to the residents of Owensboro and have maintained a positive and productive working relationship with the community and its leaders. In fact, our Owensboro General Manager, Dubby McGuire, who has been with the system since 1985, has always worked diligently to develop a close relationship with the Mayor and thus foster the communication of subscriber-related issues between the City and our system personnel. In the seven years that we have owned Owensboro on the Air, we have never had either a written or oral communication from the City relaying a subscriber complaint. In fact, during the week of December 10, 1990, Dubby McGuire and Mr. Frank Staley of our regional office met with Mayor Adkisson to discuss any concerns the Mayor or the community at large may have with the cable system. The meeting was designed by us to encourage communication of any problems or concerns by community leaders. During this meeting, Mayor Adkisson did not convey a single complaint regarding the cable system. Furthermore, Mayor Adkisson expressed only satisfaction with our operations, local origination programming and community involvement. A brief three months later, Mayor Adkisson, representing those cities which want to reinstate massive regulation of the cable industry, now testifies that his experience in Owensboro with subscriber complaints and dissatisfaction requires cable to be reregulated.

We take very seriously our responsibility as a corporate citizen in Owensboro. We have spent enormous sums in creating outstanding local origination programming, including exclusive coverage of local news, sports and local interest topics. We have actively constructed lines into outlying and sparse areas to serve new customers even though we cannot hope to gain an adequate return on our capital investment. As mentioned below, we have invested significant sums in expanding channel capacity and employing microwave technologies to broaden our reach within the Owensboro area, as well as to enhance the system's technical performance. We have done all this and much more without ever being asked by the City to act in any such regard. Certainly the record shows that Century/Owensboro on the Air does not need a mandate to act in the best interests of the community it serves.

It is our policy to respond promptly and thoroughly to all complaints received from subscribers. We also have a long-standing request which we repeat frequently to the City, which is that the City notify us of any and all complaints received by the City. Mayor Adkisson states on page 3 of his testimony that "poor picture quality and poor customer service are frequent complaints." On page 11 of his written testimony he states, "Many people in Owensboro have complained about the quality of the cable signal received in their household." As I stated above, if these complaints actually occurred, they did not come to our office nor were they ever communicated by the City. In our renewal proceedings, several subscribers have identified particular problems with their cable service at our public hearings. Each one of these concerns was duly noted by a Century employee in attendance at the hearing and addressed within a twenty-four hour period.

Mayor Adkisson further complains on page 1 of his written testimony that "The citizens of Owensboro . . . are frustrated and angered by what is perceived as the lack of effort by local government officials to pressure cable television operators to provide quality programming and services at an affordable price." We will address these two concerns below. We emphasize, however, that our perception of the overall community attitude is not one of frustration or anger but of general satisfaction with the cable service our subscribers are receiving. We can find little, if anything in our experience in our operation of the system to support Mayor Adkisson's allegations. We have seen no such evidence from the Mayor.

In his testimony, Mayor Adkisson points out that the City of Owensboro and Owensboro on the Air are in the process of negotiating the renewal of our franchise which will expire in December of 1991. As part of this process, the City conducted a survey in early 1990 to determine what general public opinion exists regarding cable television service in the City. The City posed the following question among others: "Do you feel that you or the persons in your home are getting a good value from just basic cable?" Over 70% of those responding answered yes. Most businesses, and, indeed, government agencies would be pleased to receive this level of support from the public, particularly in these difficult economic times, and we expect this percentage will be even higher next year with our improved customer service procedures. As with any commercial, or even government, enterprise some members of the public will from time to time complain about specific items, but to characterize either the performance of our Owensboro cable system or our responsiveness to subscribers or to the Mayor himself as anything less than enthusiastic is not accurate. This characterization is precisely what has so surprised us. Our perception is that many of the Mayor's comments cannot possibly be motivated by the performance of our Owensboro system.

We feel that the great majority of citizens of Owensboro bear no such frustration with their cable service and recognize the excellent condition of our physical plant and the resulting picture quality, the amount, variety and high quality of programming offered, the high quality and responsiveness of our customer service, and the service provided in relation to the rates charged. While it is unrealistic to expect that in the months surrounding implementation of a rate increase that subscribers will be overjoyed, subscribers in Owensboro receive an exceptional value in their cable service.

Physical Plant and Picture Quality. Since our acquisition of the system in 1984 we have made extensive and dramatic capital improvements in the system totalling over $6,000,000 of expenditures which have resulted in, among other things, continuing enhancement of the capacity and quality of our physical plant and continuing enhancement of picture quality.

In his written testimony (page 5) Mayor Adkisson states "According to the financial analysis conducted by Rice, Williams and Associates, Century Communications Corporation is in a sound financial position, yet in the absence of effective competition, we are seeing only marginal capital improvements by Century in its Owensboro operations." This is an extraordinary statement in direct contradiction to the facts. In order to enhance service and picture quality, we have undertaken two major electronic upgrades of Owensboro on the Air since 1984. In 1986 we increased channel capacity from 20 to 36 channels. In 1988 we increased channel capacity from 36 to 46 channels. As part of these upgrades all electronic equipment in the distribution system was replaced and headend equipment was added at substantial costs. During the 1988 upgrade much of the cable plant was replaced as well. In 1990 we installed a 4 hop AML microwave system at our headend, once again at a substantial cost.

Mayor Adkisson further stated on page 12 of his written testimony that a technical evaluation of the system "recently conducted by Rice, Williams and Associates, revealed thct several FCC specifications on signal quality were not being met due to the age of the system and lack of an effective preventive maintenance program. As a result, our consultants recommend that the system be overhauled and upgraded to comply with FCC specifications and meet the future needs of our community." By omitting a description of our swift correction of discrepancies identified in the technical evaluation, Mayor Adkisson's statements are misleading. In fact, during a field examination of the plant in the presence of Rice, Williams, our staff corrected most, if not all of the items brought to our attention in their review. With respect to the recommendations of the City consultant for an "overhaul", we have yet to be involved in a franchise renewal negotiation involving "consultants" that has not generated this demand, irrespective of the age, channel capacity, or integrity of the current system and without regard to economic feasibility, the impact on subscriber rates or the ability of the cable company to hope for a return on investment. These types of questionable demands are major contributors to the pressure to increase rates.

Mayor Adkisson's statement that Owensboro on the Air lacks an effective preventive maintenance program is erroneous. We have developed a comprehensive and constantly evolving in-house training program in conjunction with the National Cable Television Institute. This program ensures that our technicians and installers are properly trained on an ongoing basis. The Owensboro system has a full time staff of qualified technicians on the local level with regional and national staff as available resources to aid in the constant maintenance of the system. Additionally, as part of the FCC/CLI requirements, the technical staff constantly monitors signal leakage. Our signal leakage program has been highly successful and our results have been verified by an independent agency. A recent "flyover" test of the system produced a score of 99.94%, a testament to the integrity of the plant. In the course of ordinary business, Owensboro on the Air also performs technical sweeps of the plant in order to ensure a high level of signal quality. In any cable system, particularly one such as the Owensboro system with 454 miles of plant, there are bound to be occasional failures and minor problems, some of which may never be reported to the system by subscribers. We have instituted a program of random end-of-line inspections to speed up our location of these unreported problems on an ongoing basis. As I mentioned above, all discrepancies noted in the September 24, 1990 report by Rice, Williams were either corrected on the spot or immediately thereafter. Each of these localized discrepancies affected very small areas of our plant.

Programming. One of the results of the upgrades we have undertaken is an increase in the amount, variety and quality of programming offered by Owensboro on the Air. Over the past five years our program offerings have increased from 20 to 46 channels, an increase of 130%. On page 11 of his written testimony Mayor Adkisson states that subscribers have "no input into programming choices made by corporate magnates located out-of-state serving their own needs rather than fulfilling those of citizens in the community who pay for cable service." This is not true. The Company considers many criteria including local community concerns when making programming decisions. Other criteria we consider include available channel capacity, categories of programming presently offered, available programming, the license fee and the other material terms of the contract we must enter into with a programmer to distribute a service. We always evaluate evidence of subscriber interest in a particular service and rely on the expertise of local management who are knowledgeable with respect to each community, as to the type of programming suitable for the community. On the other hand, we are not comfortable with the prospect of local government officials "advising" the cable operator as to what programs should be carried or deleted. As part of this process many popular services have been added to the Owensboro line-up over the past several years including Headline News, Turner Network Television, Trinity Broadcasting Network American Movie Classics, the Discovery Channel, the Travel Channel, Nostalgia and Black Entertainment Television.

Customer Service. In part four of his written testimony Mayor Adkisson addresses the subject of Customer Service. As we stated above, the lack of complaints received from the City and the sparsity of complaints received directly by the system from our subscribers regarding customer service evidences the community's satisfaction with our prompt and courteous customer service program. At the commencement of renewal proceedings in the beginning of 1989, the City established a Cable Advisory Board which initially met at least monthly and now schedules meetings once every six weeks. Our General Manager, Dubby McGuire has attended each meeting but for one which was attended by the system's Chief Technician. During this period from early 1989 until now although there have been a few isolated concerns expressed by subscribers at these meetings about their own individual service, not once did the Cable Advisory Board raise any of the issues addressed in Mayor Adkisson's testimony to the Subcommittee.

On page 13 of his testimony Mayor Adkisson states that if cities were given the authority to adopt more stringent consumer service standards, "Local franchising authorities, who are closest to the consumers, would then be in a position to effectively address inequitable billing practices, unreasonable responses to cable outages, rebates during outages, time-frames for installation and telephone answering services provided by the operator to handle consumer complaints." First of all, cities have more than sufficient authority under existing law if they seek reasonable customer service. Secondly, we feel that Mayor Adkisson's comments cannot possibly arise from his experience with the Owensboro system. In fact, Mayor Adkisson makes these comments in an ambiguous fashion, and we believe the reason that his comments are not directed specifically at Owensboro on the Air is that we promptly respond to cable outages, generally succeed in responding to service calls within one working day, and perform installations within three working days, and maintain a telephone system which helps to ease the flow of customer calls throughout our customer service staff.

Rates. Several times in his written and oral testimony Mayor Adkisson expressed his concern with cable television rates in Owensboro. On page 4 of his written testimony for example, the Mayor wrote "from April, 1990, to March 1991, the basic monthly subscription rate for cable service in Owensboro went from $14.95 to $20.95, an increase of forty percent (40%) in one year." This is simply not true. First, the rate for basic service in Owensboro is only $18.95, $2.00 less than Mayor Adkisson claims. Second, beyond the factual error, the statement is misleading because the Mayor fails to state that the Company customarily adjusts rates in the Spring of each year. Thus, the increase from $14.95 to $18.95 involved two distinct rate adjustments over a two year period. The Company is not behaving in the unreasonable fashion suggested by the Mayor. In fact, the City of Owensboro itself has been a factor in the decision to increase rates. During the period from 1984 to 1989 among other increasing governmentally imposed costs, the personal property taxes paid by the system to the City increased from $25,187 in 1984 to $88,665 in 1989, an increase of 252%.

An examination of our historical efforts to improve service also shows what a remarkable and better bargain cable is in Owensboro. The system began distributing signals in 1974 at a rate of $6.95. When we purchased the system in 1984 the system offered 12 channels of programming on basic service at a rate of $11.20 or $0.93 per channel. Today we offer 32 channels of programming on basic service at $18.95 or $0.59 per channel. Thus, we have added nearly 300% more programming of much higher quality than the programming distributed in 1984 with modest price increases. This illustrates the unfairness of taking a snapshot of such a short period in the scheme of the development of one of the nation's most remarkable business success stories of this past decade.

When questioned by Senator Packwood about the rates which were kept artificially low by rate regulation prior to the Cable Act, Mayor Adkisson had no comment. The fact is that such artificial control did hold rates back for many years requiring cable operators to "catch up" in order to ensure a return on the enormous investments the industry has made in upgrading technology, rebuilding facilities and expanding programming to better serve subscribers.

Mayor Adkisson responded to a question that he did not have any power to regulate a monopoly. The facts are plain. We do not have, and have never requested or received an exclusive franchise to provide cable service in Owensboro. We are, in fact, at the time the only holder of a cable franchise, but we compete with SMATVs, backyard dishes, and video tape outlets and large numbers of people find the available local broadcast stations are more than enough TV in their lives. We are not a monopolist in Owensboro and the record shows we do not behave as one.

In addition, contrary to the Senator's questions and the Mayor's responses, we are most certainly not unregulated, as anyone who has read the Cable Act or have gone through the franchise renewal process can attest. In fact, the Cable Act is absolutely laden with regulations, as are virtually all ordinances and franchises under which cable companies operate, and to characterize the industry as unregulated solely based on selected freedoms to set rates is to ignore the plain facts.

In conclusion, many of Mayor Adkisson's statements are quite general in nature and those that are specific to Owensboro refer to issues that the Mayor has never taken the time to discuss with us. What is clear is that the Mayor makes numerous references, both in his testimony and in his responses to inquiries, that a major concern of his is his constituency's perception of his authority. It seems unjust to us to be on the receiving end of baseless allegations which deliver in a public forum an inaccurate picture of our Company and which seem motivated, at least in part, by concerns unrelated to the quality of our cable service. The fact is that the cable television industry is not immune to the skyrocketing costs of providing service and that, as opposed to a product such as a gallon of gas (which is still the same gallon it was 20 years ago) the quantity and quality of cable programming has grown at a spectacular rate over that same 20 years and will likely continue to do so. Cable television service is a great bargain.

Perhaps I could better understand the allegations made against our Company if we had not invested huge sums in the Owensboro system and had not adjusted rates in a reasonable manner. What Mayor Adkisson terms the "aftermath" of the Cable Act is more accurately represented in the FCC report to the Congress which describes the fulfillment by the cable industry of its promise. As the FCC report states, new programming sources have emerged and viewers continue to reaffirm with each passing month their desire to subscribe to cable service. The resulting revenues to cable operators have been poured back into the development and implementation of major industry-wide enhancements such as fiber optic construction and digital compression technologies, in which our Company is deeply involved.

Mayor Adkisson states that we "have no incentive to be responsive to local government and the concerns of our constituents". I believe that we do indeed have enormous incentive to be responsive so long as government intervention does not intrude on our programming selection. We are a company with integrity, one unafraid to reinvest frequently in our cable system across the country and determined to provide excellent service. We can only prosper as we satisfy our subscriber's needs. Indeed, since 1984 we have added almost 900 new subscribers in areas already wired in Owensboro in 1984. While rates have certainly increased, new subscribers have been added since the enactment of the Cable Act because the Act has enabled us to add new capacity and more program services at a drastically reduced per channel cost on basic service.

We maintain our commitment to fostering a positive working relationship with Mayor Adkisson and the Owensboro community, not only during franchise renewal negotiation but for the entire term of our operation in the City of Owensboro.

Thank you in advance for taking the time to consider the views of our company.

Very truly yours,

Andrew Tow

Andrew Tow
Vice President

AT/mbm

cc: All Members of the Senate Subcommittee on Communications

JOHN WAIHEE
GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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ROBERT A. ALM
DIRECTOR
COMMISSIONER OF SECURITIES

SUSAN DOYLE
DEPUTY DIRECTOR

April 19, 1991

The Honorable Daniel K. Inouye
United States Senator
722 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Inouye:

Re: S. 12, Cable Television Consumer Protection Act of 1991

I am writing to congratulate you on this year's S. 12 and to offer some information and comments for the imminent mark-up of the bill.

As you know, the State of Hawaii, both through this department's testimony before Congress and through resolutions passed by our Hawaii State Legislature, has strongly urged federal action to reregulate cable television rates. We have been particularly interested in assuring both that rate regulatory authority in the cable television area is returned to local jurisdictions and that the return of such authority is in fact worthwhile. We believe that S. 12 has addressed the concern we expressed to you last year that the cable companies' ability to create new service tiers could thwart Congress's effort to reregulate cable rates.

I cannot overemphasize the importance of this legislation to the people of Hawaii. As you know, the Federal Communications Commission is expected to adopt new "effective competition" rules in the very near future. Under its proposed rules, all of Hawaii's cable systems would be subject to rate regulation. However, unless Congress acts to change current federal law as proposed in S. 12, to allow for regulation of the service tier to which most consumers actually subscribe, virtually none of Hawaii's cable subscribers will be helped by the return of rate regulatory authority.

To assist you in your efforts, we asked Price Waterhouse, our consultant for accounting and financial matters, and Rice, Williams Associates, our consultant for cable ascertainment and access issues, to conduct studies relating to our actual experience with cable service tiering in the State of Hawaii. The results of the enclosed studies clearly support the need for the changes contained in S. 12.

The Price Waterhouse study examines how cable companies have crafted the introduction of tiering to discourage subscribers from taking the lowest basic service tier. It also analyzes the material provided by Oceanic in its tiering proposal and shows how well the company has performed since deregulation, both by local and national standards. Finally, the study reviews both the 30 percent test and its possible limitations and other concerns regarding the language of S. 12. The Rice, Williams survey of cable consumers in Hawaii supports Price Waterhouse's findings and confirms what we have thought about why consumers have or have not chosen to take the lowest service tier.

After reviewing the Price Waterhouse and Rice, Williams reports, we would propose an alternative to the 30 percent test which we believe could be less problematical and achieve the same results. Our proposal would be to eliminate the 30 percent test and instead redefine "basic cable service" as follows:

> "Basic cable service" means any service tier which includes the retransmission of local television broadcast signals and any service tier or combination of service tiers which must be purchased by a cable subscriber as a prerequisite to the purchase of any other service offered on a per channel or per program basis.

The National League of Cities, National Conference of Mayors, and National Association of Counties have taken a similar approach in their proposed mark-up of S. 12. We have reviewed their proposal and are fully in support of their recommendations with respect to Section 623, Regulation of Rates.

Again, thank you for your continued efforts on behalf of our cable consumers. If we can be of further assistance, please call me at 586-2850 or my deputy, Susan Doyle, at 586-2855.

Very truly yours,

Robert A. Alm
Director

SUPERSTAR
CONNECTION

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VIA FEDERAL EXPRESS

April 23, 1991

The Honorable Daniel K. Inouye
Chairman, Communications Subcommittee
722 Hart Building
Washington, DC 20510

Dear Chairman Inouye:

Your March 14 subcommittee hearing on cable negotiations was of great interest to those of us at Superstar Connection. Superstar Connection is the major distributor of superstation signals to the home dish market. Superstar and its parent company, United Video, Inc., uplink four superstation signals, WGN, WPIX, KTVT and KTLA. In addition, Superstar distributes eleven other superstation and network signals.

Superstar Connection would be remiss, Mr. Chairman, if it did not challenge the testimony given before you by Mr. Bob Phillips, Chief Executive Officer of the National Rural Telecommunications Cooperative (NRTC). NRTC is both a customer and a competitor of Superstar Connection. NRTC is attempting to use the Congress of the United States to further its competitive position.

Mr. Phillips objected (in the Appendix to his testimony, page 2) that the bill exempts superstation carriers from the nondiscrimination requirements. Superstation carriers are already prevented from discriminating under copyright compulsory license legislation. There is no need for additional legislation. What Mr. Phillips wants is government regulation imposed on a free market system operating in a very competitive environment. Under the compulsory license, anyone can uplink a local television signal and turn it into a superstation if he is willing to pay the cost and take the risk. The WGN signal, for example, has been uplinked by two companies using C-Band technology and one company using K-Band. Others have announced plans to uplink WGN. Competition is present, and competition controls pricing. Government pricing controls should not be imposed on a competitive free market just to further the profit goals of NRTC.

Mr. Phillips stated further (Appendix, page 3, first paragraph) that NRTC has participated in legal proceedings before the Federal Communications Commission for over two years to obtain fair pricing from satellite carriers.

What Mr. Phillips failed to state was that, to date, the FCC has ruled against NRTC. When Mr. Phillips alleged that carriers discriminate among distributors, the FCC ruled, after a thorough examination of the facts, that NRTC's allegations were without merit.

Mr. Chairman, NRTC falsely claims that it is the champion of rural America when it comes to television services. NRTC has 56,000 rural customers. Superstar Connection has approximately 200,000 rural customers for whom we provide toll-free customer service twenty-four hours a day, seven days a week. While we serve rural American dish owners far more extensively than NRTC, we are a small company of eighty employees. NRTC is a giant government-subsidized cooperative attempting to use government regulation to gain competitive advantages. If NRTC succeeds, and if Congress accedes to NRTC's pressure, Superstar Connection will be forced to pull down three of its four superstation signals it now provides to rural television viewers.

Congress has maintained that open access and competition are the best guarantees of fair pricing. Anyone, including NRTC, can uplink a superstation. Three companies have already uplinked the WGN signal. Competition is keeping superstation pricing in line. We ask that Congress allow competition to work.

Sincerely,

Jerry Parker

Jerry Parker
Director of Market Development

GLP/sls

DAVID C. ADKISSON
MAYOR

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COMMISSIONERS
R. L. McFARLAND, SR.
MAYOR PRO TEM
WAYMOND MORRIS
ALAN BRADEN
JACK L. ROSS

May 6, 1991

MAY [illegible] 1991

Senator Wendell H. Ford
Senate Subcommittee on Communications
United States Senate
Russell Building
Room No. 173A
Washington, DC 20510

RE: Cable TV Consumer Protection Act of 1991

Dear Senator Ford:

I have reviewed with considerable interest the rebuttal submitted by Mr. Andrew Tow, Vice President of Century Communications Corporation, to the testimony I presented before the Communications Subcommittee on March 14, 1991, regarding Senate Bill 12. Mr. Tow's comments are not surprising and represent the views of the cable industry in general. As a public official, I welcome constructive criticism on this issue, but I am somewhat dismayed by Century's failure to recognize subscriber-related concerns that have been identified on a local and national level. Consumer complaints are constituents complaints that simply cannot be ignored by elected officials.

While Mr. Tow's response contains several inaccuracies, I see no utility in debating the validity of the numbers and basic facts. Our disagreement is more philosophical and emanates from the frustration and inability to address what our constituency perceives as the basic problems with the cable system, i.e. quality cable service at an affordable price. To suggest, as Mr. Tow does, that there have not been any subscriber complaints is absurd. The Citizens Advisory Committee on Cable Television held a hearing at City Hall on March 26, 1990, at which time the public was afforded an opportunity to air grievances about cable service in Owensboro. Many people attended and presented a variety of subscriber complaints that are now a matter of public record. Mr. Dubby McGuire, the local cable system manager, attended this hearing and is well aware of the consumer issues raised at that time. Secondly, it is important to note that it is not the City of Owensboro's responsibility to receive and address subscriber complaints concerning cable t.v. service. Customer dissatisfaction and complaints are the sole responsibility of our local operator, and Century Communications Corporation, and we regularly refer complaints to them.

As I testified before your subcommittee, community leaders across the nation are concerned and frustrated by their inability to restore some reasonableness to cable rates that are spiraling out of control in the absence of effective competition in the industry. Some degree of interim regulation is necessary until a competitive marketplace develops.

Despite our current philosophical differences, we are very grateful to Century Communications for six (6) years of dedicated cable service to our community, which include local origination programming and other community services. We recognize Century as a valuable corporate citizen in Owensboro and look forward to joining with them during the renewal process in finding solutions to subscriber concerns, exploring innovative technologies and services, and hopefully negotiating a franchise that will provide quality cable services at an affordable rate to the citizens of this community well into the next century.

Again, thank you for the opportunity to present testimony on the Cable T.V. Consumer Protection Act of 1991. We applaud your efforts to place the needs of consumers above the private interests of the cable industry.

Sincerely,

David C. Adkisson

cc: Senate Subcommittee on Communications

DCA/sk

NBC-LEO
National Black Caucus of Local Elected Officials

1301 Pennsylvania Avenue, NW Suite 400
Washington, DC. 20004 (202) 626-3130

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Past President
Donald Tucker
Councilmember
Newark, NJ

Robert Farrell
Councilmember
Los Angeles, CA

June 18, 1991

Dear Senator Inouye:

I am the president of the National Black Caucus of Local Elected Officials (NBC-LEO), the association representing locally elected Black Mayors and Councilpersons. I am writing to express our opposition to an amendment to the pending Senate cable bill, S.12, that would unintentionally have a very harmful effect on Black-owned television stations. As you well know, the Congress and the FCC have endorsed polices designed to increase the number of minority-owned television stations in the United States. There has been some notable progress in recent years but the fact remains that only 21 of the more than 1100 U.S. commercial television stations are owned by African Americans. Significantly, almost a third of those stations are affiliated with the Home Shopping Network, Inc., which in many cases, loaned these entrepreneurs construction funding after banks and other traditional lenders refused to extend them credit.

HSN's support has helped increase the ranks of Black television station owners. This is important because with ownership comes the opportunity that these new stations will produce non-entertainment, news, educational and informational programs that will address issues of particular interest to African Americans within their service areas.

I am aware that the economic strength of television stations today depends, in large part, on their carriage by cable television systems within the stations' service areas. Therefore, NBC-LEO opposes any amendment to S.12 that would effectively deny cable carriage to stations merely because they are affiliated with HSN. Such an amendment totally ignores the local issue-oriented programming record of the Black-owned HSN affiliated stations. It is our position that if local television stations must otherwise qualify for cable carriage under S.12, they should be included in the pool of all other eligible stations and should not be excluded merely on the basis of their network affiliation. Such an amendment would make it extremely difficult for the Black-owned HSN affiliated stations to survive if all

REGIONAL DIRECTORS

REGION 1 (VT NH ME MA CT RI) William Dorsey, Mayor Augusta, ME • REGION 2 (PA NY NJ VI) Mary Pinkett, Councilmember New York City, NY • REGION 3 (KY WV VA MD DC DE) Henry Marsh, Councilmember Richmond, VA • REGION 4 (OH IN) Roosevelt Coats Councilmember Cleveland, OH • REGION 5 (MI) Woodrow Stanley, Councilmember Flint, MI • REGION 6 (IL) Erie Ellis, Councilmember Maywood, IL • REGION 7 (ND SD MN WI) Vacant • REGION 8 (MO IO NE KS CO) Leon Young, Mayor Colorado Springs, CO • REGION 9 (AK WA OR ID MT WY) [illegible], Councilmember Olympia, WA • REGION 10 (CA NV UT AZ HI) Paul Richards, Councilmember Lynwood, CA • REGION 11 (NM OK TX) David Moore, Councilmember Beaumont, TX • REGION 12 (AR TN) [illegible], Councilmember [illegible], TN • REGION 13 (LA) Wilfred Pierre, Councilmember Lafayette, LA • REGION 14 (MS) David Jordan, Councilmember Greenwood, MS • REGION 15 (AL) Linda Coleman, Councilmember Birmingham, AL • REGION 16 (GA FL) Fredd G. Atkins, Councilmember Sarasota, FL • REGION 17 (SC) Ralph Anderson, Councilmember Greenville, SC • REGION 18 (NC) Larry W. Womble, Alderman Winston-Salem, NC

other local full powered television stations in their market are eligible for cable carriage but they are not. Such an amendment may well destroy one third of all Black-owned television stations. I urge the Senate Communications Subcommittee to reject this amendment.

Sincerely,

DKTabor

Daniel K. Tabor,
President
National Black Caucus
of Local Elected Officials

DKT:sw

cc: Senator Alan Cranston
Senator John Seymour
Congressman Julian Dixon
Congressman M. Dymally
Congresswoman Maxine Waters
Pluria Marshall, Executive Director, National Black Media Coalition
Mayor Frances Huntley-Cooper

HSN . HOME SHOPPING NETWORK, INC.

July 7, 1991

The Honorable Daniel K. Inouye
Chairman
Senate Communications Subcommittee
of Committee on Commerce, Science
and Transportation
227 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Inouye:

During the hearings you conducted on June 20, 1991, you asked me for a response to a letter addressed to you dated June 18, 1991, from Robert Thomson, Vice President of Tele-Communications, Inc. At that time, I indicated that I had not yet seen the letter, and requested an opportunity to respond in writing. This letter provides that response.

Although the numbers in TCI's letter appear to be fairly accurate, they nonetheless seriously distort the facts. As this letter will detail, the carriage of HSN programming on Storer systems is directly the result of a contract that HSN had with Storer that predated TCI's involvement in the Storer systems. The carriage of HSC programming on TCI systems for the most part are the result of separate agreements that HSN has reached with broadcast stations to carry Home Shopping Club programming on a full or part-time basis, to which TCI was not a party. For example, much of the TCI carriage of "HSN programming" results from TCI's carriage of WWOR, which has a contract with HSN to carry three hours of Home Shopping Club programming six mornings a week from 3 a.m. to 6 a.m. EDT. As I testified at the hearing, TCI has been unwilling to enter into a single contract with HSN despite HSN's continuous efforts since 1985 to reach such formal agreements.

According to our records compiled from industry sources (A.C. Nielsen), TCI itself has 5,753,171 subscribers, of which 2,593,469, or almost half, receive no HSC programming at all. Of the other 3,159,702 TCI subscribers that receive HSC programming, over one million (1,260,783) subscribers receive WWOR, which airs only three pre-dawn hours per day of HSN programming (some of those also receive HSN's cable-only programming service on a separate channel).

Robert T. Sutton
President
P.O. Box 9090
Clearwater, FL 34618-9090
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Only 439,168 subscribers, or 7.6 percent of TCI's overall subscriber base, receive full-time Home Shopping Club programming aired by HSN's owned and operated or affiliated stations. In contrast, over two million (2,014,744) TCI subscribers receive HSN's Spree, virtually all of it on a part-time basis.

As these figures demonstrate, the vast majority of the carriage that HSN has achieved on TCI cable systems results from HSN's agreements with WWOR and other stations that carry Spree on a part-time basis.

With respect to Storer systems managed by TCI, they carry HSN programming due to the preexisting contract between Storer and HSN. Our records indicate that such systems include 747,318 subscribers, of which over one-third, or 275,681, receive HSC broadcast programming resulting from retransmission of full-time HSN O & O or affiliated broadcast stations. No Storer systems managed by TCI, according to our records, carry WWOR.

While the TCI numbers may be more current than those we obtained from industry sources, I am confident that the general trends I have detailed above are accurate. They clearly indicate that significantly more Storer systems (with which HSN had a preexisting agreement) than TCI systems (with which HSN has no contract) carry HSN O & O or affiliated broadcast station signals.

TCI's letter does not disclose TCI's connection with HSN's primary cable programming competitor, QVC. Moreover, TCI's failure to distinguish between full-time broadcast carriage and either cable programming carriage or part-time Spree carriage misleadingly implies that TCI's carriage of HSC broadcast programming is more extensive and more voluntary than it is. As a result, TCI has obfuscated its own refusal to deal with HSN and the extent to which TCI has deprived its subscribers of the local programming that the HSN stations, and many of HSN's broadcast affiliates, provide.

I hope that you will agree that the figures in this letter present a more complete picture than the overall numbers and percentages that TCI's letter presents. I am very appreciative of the opportunity you provided me to testify and to respond in writing to the TCI letter, and I will be pleased to answer any additional questions you may have.

Very truly yours,

Robert

Robert T. Sutton
President
Home Shopping Network, Inc.

SCHNADER, HARRISON, SEGAL & LEWIS

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ARLIN M. ADAMS
215-751-2072

July 11, 1991

Honorable Daniel K. Inouye
Chairman, Senate Communications Subcommittee
227 Hart Senate Office Building
Washington, D.C. 20510

Re: Proposed Cable Must-Carry Provisions

Dear Mr. Chairman:

Enclosed is a constitutional analysis prepared by myself and Deena Schneider, of our office, covering the must-carry provisions of S. 12, the Cable Television Consumer Protection Act, and a related amendment that has been proposed by Senator Breaux. This analysis is being submitted for inclusion in the record on the June 20, 1991 hearing on S. 12, which is currently being considered by the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation.

During my tenure on the United States Court of Appeals, in my practice, and as a result of teaching First Amendment courses at the University of Pennsylvania Law School, I developed considerable expertise in this area. My colleague Deena Schneider's practice has for some time involved her in First Amendment issues in the communications field, particularly with respect to the cable industry.

As our analysis shows, in our judgment the must-carry provisions of S. 12 as presently drafted may well violate the First Amendment. However, the amendment to these provisions proposed by Senator Breaux would reduce the possibility that S. 12 will be declared unconstitutional. In our view, the amendment does not raise additional First Amendment issues.

Sincerely,

Arlin M. Adams

Arlin M. Adams

Enclosure

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 11, 1991

IN REPLY REFER TO:

Honorable John B. Breaux
United States Senate
516 Hart Office Building
Washington, DC 20510-1803

Dear Senator Breaux:

This letter will provide a more detailed response to your inquiry, made during the Subcommittee's June 20, 1991 hearing on the public interest standard, as to whether programming broadcast by home shopping television stations is considered "commercial matter" by the FCC. As discussed below, the Commission does treat the programming on home shopping stations as commercial in nature, even though such stations often sell products directly to audience members rather than selling airtime to third-party advertisers.

In 1984, the Commission abolished its earlier guidelines on commercial matter.[1] See Deregulation of Television, 98 FCC 2d 1076 (1984), recon. denied, 104 FCC 2d 357 (1986), aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987). As a result, the Commission no longer has a general definition of "commercial matter" that it uses for television stations.

However, as required by the Children's Television Act of 1990, the Commission recently adopted rules which limit the amount of advertising that broadcasters and cable systems may carry during children's programming. In its Report and Order in MM Docket No. 90-570, FCC 91-113 (released April 12, 1991) ("Children's Television Order"), the Commission generally defined "commercial matter" in the children's television context as "air time sold for purposes of selling a product." Id. at ¶ 4. The Commission clarified that air time would be considered "sold" if the advertiser gave "some valuable consideration either directly or indirectly to the broadcaster or cablecaster as an inducement for airing the material." Id. at ¶ 5. This definition was intended to be generally consistent with the prior definition of "commercial matter" used by the Commission when applying the commercial guidelines abolished in Deregulation of Television, discussed above. Id. at n.18.

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[1] Those guidelines suggested that television stations carry no more than 16 minutes of commercial matter per hour. Deregulation of Television, 98 FCC 2d at 1101.

To the extent that manufacturers provide some valuable consideration to home shopping stations, either directly or indirectly, in exchange for having their products appear on the stations, such programming clearly would be considered "commercial matter" under both the Children's Television Order and our earlier decisions. It is our understanding, however, that home shopping stations often buy the merchandise they advertise and then sell that merchandise directly to viewers. In this situation, the station does not "sell" air time to third party advertisers but rather advertises the product itself.

The Children's Television Order does not specifically address whether programming in which a broadcaster directly sells merchandise to audience members should be considered "commercial matter" in the children's television context. However, the Order does cite KISD, Inc., 22 FCC 2d 833 (1970), in which the Commission fined a station for failing to log as "commercial matter" announcements promoting dances and concerts staged by the station itself. A similar result was reached in Program-Length Commercials, 43 RR 2d 683 (1978), in which the Commission held that when a broadcaster sells goods on the air to obtain cash revenue for the station, the programming is commercial matter despite the fact that the airtime was not "sold" to an outside advertiser.

These cases reflect the Commission's determination that material should be considered "commercial matter" even though it is the licensee, not some third party, that is advertising a particular product, service or event. I would note that this approach is consistent with other Commission statements describing home shopping broadcast stations as employing a "predominantly all-commercial format." Family Media, Inc., 2 FCC Rcd 2540, aff'd sub nom. Office of Communication of United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir. 1990); see also Children's Television Order at n.17 (referring to home shopping stations as having "an all-advertising format").

I hope this discussion is useful to you. Please let me know if you have any further questions about this matter.

Sincerely yours,

Bob Pettit

Robert L. Pettit
General Counsel

July 3, 1991

VIA HAND DELIVERY

The Honorable John Breaux
United States Senate
Second Street and Constitution Avenue, N.E.
Washington, D.C. 20510

Dear Senator Breaux:

On June 20, 1991, the Senate Subcommittee on Communications held hearings regarding the public interest obligations of broadcasters to the public under the Communications Act of 1934. A main focus of the hearings was a proposed amendment to S.12 of the Cable Consumer Protection Act of 1991 sponsored by you. That amendment would deny "must carry" protection to home shopping networks. I am a long-time opponent of must carry regulation in any form, and I am vehemently opposed to any legislation that would grant home shopping networks must carry protection. Home shopping networks fail to satisfy any broadcast public interest goals established by either the Congress or the Federal Communications Commission ("FCC"). Therefore, I agree with your position that home shopping services do not warrant the benefit of protection under any must carry legislation.

However, if must carry regulations are indeed imposed, I strongly urge the Congress to include within such legislation the option for cable operators to meet their must carry obligations by carrying programming services which provide minority programming to the general public. Congress and the FCC have long supported policies designed to promote diversity of programming. Moreover, true minority programming services, such as Black Entertainment Television ("BET"), more effectively serve the public interest mandate of the Communications Act than does home shopping programming.

BET is the first and only cable television network to provide quality programming to minority audiences. Our programming consists of news, public affairs, sports and children's programming, as well as entertainment programs targeted to minority viewers. The black oriented programming broadcast on the BET network is not otherwise available to the television viewing audience. Accordingly, granting BET must carry protection as a minority program service would not only serve the public interest, but would also further the diversity in programming goals of Congress and the FCC. Bestowing must-carry protection upon home shopping networks would not serve to fulfill or promote any such public interest obligations.

Black Entertainment Television
1232 31st Street, N.W.
Washington, D.C. 20007 (202) 337-5260

Therefore, I support your opposition to any legislation which would grant home shopping networks must carry protection, and urge you to consider protection for minority programming services that serve the public interest.

Warm Regards,

Robert L. Johnson

Robert L. Johnson
President

cc: Members of the Senate Subcommittee
on Communications
Members of the Congressional
Black Caucus

July 12, 1991

VIA HAND DELIVERY

The Honorable Daniel K. Inouye
United States Senate
Room 722 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Inouye:

The undersigned collectively own eight of the television stations controlled by minorities in this country representing approximately 1/3 of the black owned stations. Our stations are affiliated with the Home Shopping Network, Inc. At the June 20, 1991 hearing before your Communications Subcommittee on the proposed Breaux amendment to S. 12, we each offered written testimony strongly urging rejection of the proposal to deny must carry eligibility to stations merely because of their affiliation with HSN.

At that June 20, 1991 hearing, testimony, both written and oral, was presented by Bruce Llewellyn, who among other things, sits on the board of QVC Network, Inc., the chief competitive rival of HSN. Mr. Llewellyn's written testimony claimed that providing must carry eligibility to HSN affiliated stations would not further minority television ownership. Since this claim is not only factually inaccurate, but outrageous in concept, we wish to briefly respond.

At the outset, it should be noted that we respect Mr. Llewellyn for his many accomplishments in the business world. As the former head of FEDCO Foods, a New York based supermarket chain, the owner of the Philadelphia Coca-Cola Bottling Company, and the partial owner of a major market television station and a cable system with over 180,000 subscribers, Mr. Llewellyn ranks as one of the most successful and wealthiest black entrepreneurs in this country. We applaud his success and believe that it should be used positively to further continued minority business development in this country. With all due respect, however, he is not the sole model for the development of increased minority ownership in the communications industry today.

In 1985, Mr. Llewellyn was already a millionaire when he acquired WKBW-TV, Channel 7 in Buffalo, New York affiliated with the ABC broadcasting network. He paid $65 million for this station as part of the spin-off of the Capital Cities Communications, Inc. television stations following its acquisition of the ABC network.

The sale to Mr. Llewellyn provided Capital Cities Communications, Inc. with an FCC-authorized tax certificate pursuant to the FCC's minority ownership policies. Mr. Llewellyn's station is a high powered, VHF network affiliate operating in a top television market.

By contrast, the undersigned have in the past five years purchased or obtained through the FCC hearing process, UHF television stations operating generally in smaller markets in the country. In the case of Roberts Broadcasting Company, Urban Broadcasting Corporation, and Jovon Broadcasting Corporation, construction permits were obtained from the FCC following, on average, nearly ten years of hearings before that agency. In the case of Blackstar Communications, Inc. new and struggling UHF television stations were acquired from owners who were unable to profitably operate their stations. In contrast to Mr. Llewellyn's television station, our stations are the newer, UHF stations not affiliated with one of three major networks. We did not have $65 million to spend for a major market network affiliate. Indeed, we were unable to secure conventional bank financing to construct or initially purchase our independent UHF stations. This inability generally stemmed from the banks' insistence on guaranteed cable carriage. We did, however, have the good fortune to have HSN willing to participate in financing the construction or acquisition of our stations, or to enter into television affiliation agreements which enabled us to independently obtain bank financing. In some respects, we all wish that we were in Mr. Llewellyn's position -- millions of dollars to spend on VHF television facilities affiliated with major networks. However, the reality is that by the time we were able to enter into ownership of television properties, such stations no longer existed (or at least no one was willing to loan us $65 million or more).

Without HSN, the only minority television station owner who would have submitted testimony before your Subcommittee on June 20, 1991 would have been Mr. Llewellyn owning a single television station in this country. However, because of HSN, six other minority television owners, representing collectively eight additional television stations, presented testimony. Our stations are not as big or as powerful as Mr. Llewellyn's but, we submit, they are doing just as good a job of serving their local communities.

We want to briefly point out some of the factual errors in Mr. Llewellyn's testimony relating to minority ownership of HSN affiliated stations.

1. Mr. Llewellyn is wrong that our television stations are somehow "captive" to HSN. Our stations are affiliated with HSN through written Television Affiliation Agreements that contain essentially the identical terms contained in Mr. Llewellyn's affiliation agreement with the ABC Network. We are no more captive of HSN than Mr. Llewellyn is of ABC. Pursuant to our HSN

Television Affiliation Agreement, we have the right to reject HSN programming, to substitute programming that we feel is more important to our community and to otherwise air those amounts of programming that we feel are necessary to serve the interests of our communities. Like Mr. Llewellyn's station, we are compensated for the amount of network programming we broadcast but like all local station owners we make all the final programming decisions.

2. Mr. Llewellyn is wrong in stating that HSN affiliated stations are not furthering minority participation in communications. Our stations are owned and, to a large extent, are operated by minorities who are getting on-the-job training that would not otherwise have been available to them. Many of us have minority intern programs, our managerial staffs are predominately minority and because of our existence we are training the next generation of minority television broadcasters. What Mr. Llewellyn does with his television station in Buffalo is laudable. However, it is only one station. What we do at our stations is also laudable but, it must be remembered, it represents the efforts of eight television stations.

3. Mr. Llewellyn is wrong that our television stations do not broadcast programs to meet the needs of our local communities, to discuss controversial issues and to serve the needs of children and minorities. Our stations, like other HSN stations, devote a substantial amount of time on a daily basis to the broadcast of locally produced programming designed to meet the needs and interests of our communities. We also broadcast programming specifically designed for children and minorities in our service areas. For example, Blackstar Communications sends out a crew of three at its stations every week to produce 14 hours of local programming addressing local issues.

We respect Mr. Llewellyn's right to offer his views on the Breaux amendment and to speak on behalf of QVC, Network, Inc. However, we do not appreciate his efforts at denigrating our participation in the U.S. broadcasting industry. Our stations are smaller and newer and collectively we are not as wealthy as Mr. Llewellyn but that does not make us unimportant and it certainly doesn't make his views entitled to more weight. Our television stations are as entitled to must carry eligibility as Mr. Llewellyn's television station in Buffalo. We would not deny his station such carriage and he should not deny our stations equal treatment under the law.

The Honorable Daniel K. Inouye
July 12, 1991
Page 4

Very truly yours,

John E. Oxendine/ls
John E. Oxendine
President
Blackstar Communications, Inc.

Joseph Stroud/ls
Joseph Stroud
President
Jovon Broadcasting Corporation

Carmen Briggs/ls
Carmen Briggs
President
Ponce-Nicasio Broadcasting, Inc.

Steven C. Roberts/ls
Steven C. Roberts
President
Roberts Broadcasting Company

Theodore M. White/ls
Theodore M. White
President
Urban Broadcasting Corporation

Joel Kinlow/ls
Joel Kinlow
President
TV 49, Inc.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 11, 1991

Honorable Daniel K. Inouye
Chairman, Subcommittee on Communications
Committee on Commerce, Science
   and Transportation
United States Senate
227 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Inouye:

During the June 20 Subcommittee hearing on the public interest standard, you and I engaged in a colloquy regarding the children's television rules and home shopping stations. At that time, I stated that I would submit a written explanation of how the children's television commercial limits apply when a home shopping station airs ten minutes of educational and informational programming directed to children, and then follows such a segment with 50 minutes of solicitations aimed at children to purchase toys.

The Children's Television Act of 1990 imposes commercial limits during children's "programming." The *Report and Order* in MM Docket No. 90-570, which implements the Act, defines such programming as "programs originally produced and broadcast primarily for an audience of children 12 years of age and under." The Children's Television Act does not address or suggest how the Commission should apply the limits to home shopping formats. In footnote 17 of the *Report and Order*, the Commission indicated that if a station airs home shopping programming directed to *adults*, even if these ads are for toys, such material would not be deemed programming subject to the commercial limits. However, if a home shopping station airs a series of solicitations to purchase toys or other products that are directed to children, such material would be subject to the commercial limits. Thus, a home shopping station could not air 50 minutes of consecutive toy commercials directed to *children*.

The precise question which you raise, whether a home shopping station could air significant amounts of advertising in the same hour as a children's program segment, is pending before the Commission in a petition for reconsideration in MM Docket No. 90-570 filed by Telecommunications Research and Action Center, *et al*. The full Commission is now considering a detailed response in that proceeding.

Sincerely,

Alfred C. Sikes
Chairman

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July 2, 1991

BY HAND DELIVERY

The Honorable Daniel K. Inouye
Chairman
Subcommittee on Communications
Committee on Commerce, Science
and Transportation
Senate Hart Office Building,
Room 227
Washington, DC

Re: Hearing of June 20, 1991: Broadcasters' Public Interest Obligations and S. 217, The Fairness in Broadcasting Act of 1991

Dear Mr. Chairman:

At the Subcommittee's recent hearing on the fairness doctrine, you invited the witnesses' further comments on this and other subjects of the hearing. I have now reviewed the "study" introduced into the record by Mr. Denman and would like to comment briefly upon it on behalf of the Radio-Television News Directors Association.

The article by Patricia Aufderheide (Journal of Communications, summer 1990) is more in the nature of a biased argument to promote the fairness doctrine than an objective study of its effects. The article makes no real attempt to demonstrate that the amount of controversial issue programming has declined because of repeal of the fairness doctrine, as Mr. Denman suggested in his oral testimony. A relatively small part of the article does include a feeble attempt to show that repeal of the fairness doctrine has not resulted in an increase of issue programming. The emphasis on the no-increase point is evident in Mr. Denman's written statement.

The factual basis of the article's conclusion of no increase in issue programming are off-the-cuff answers by broadcasters, from only 14 radio and television stations, who are said to have failed to produce a list of programs that were aired only because of the repeal of the fairness doctrine. The broadcasters' complete answers, together with complete questions, are not given. The methodology is unscientific and not well explained.

A more important point, though, is that there has been no showing that issue programming has declined because of the repeal of the fairness doctrine (and not for some other reason, such as financial losses of stations). In point of fact, the FCC has otherwise continued to require broadcasters to present public-issue programming, and cable programming of this type has obviously increased. Even more important are the facts that (1) there has been no showing that the level of unfairness, as measured arbitrarily by the uncertain tests of the fairness doctrine, has materially increased since repeal of the doctrine, and (2) the diversity in sources of informational programming continues to grow.

The burden of justifying or refuting the need for regulation of program content like the fairness doctrine is not on those who resist it. It is on those who propose it. There must, at the least, be a compelling reason and need to interfere with the journalistic judgments of broadcasters and cablecasters.

There simply is no reason for Congress to impose -- especially in the face of strong findings to the contrary by the FCC -- what would be, after an absence of the general fairness doctrine for four years, a clearly unnecessary regulation of speech and press. To do so, we believe, would violate the First Amendment.

RTNDA is confident that radio and television journalists and their managements will continue to strive for accurate and fair presentation of controversial issues of public importance. We sincerely appreciate your conduct of the hearing on the fairness-doctrine issue in the same spirit.

We request that this letter be made a part of the hearing record.

Sincerely,

J. Laurent Scharff

JLS:jls

cc: Antoinette D. Cook, Esq.

P
ROBERT K. PHELPS
7800 TAYLOE DRIVE #143
MANASSAS, VA 22111-3750
(703) 791-[illegible]

Dear Senator Inouye;

June 21, 1991

Yesterday (6/20/91), your Subcommittee held hearings into the nature and operating policies of public-interest TV broadcasting. Since I was not allowed to testify at this hearing, I ask that a copy of this letter be attached to the hearing record, so that my views and the views of my neighbors can be considered in formulating new legislation in this area. We represent a part of the public that public-interest television was designed to serve.

I am familiar with this area of technology, both as a former radio and TV performer, and as a TV viewer. I feel most of my neighbors will agree with my opinions on this matter. I started out my broadcasting career on radio station KVRO, a small-town radio station. Most of the station personell had to do several jobs, from turning on the transmitter each morning to on-air work as a disk jockey. There was no formal news department. The teletype machine was placed in the secretary's office so the noise would not be heard in the broadcast studio, and go out over the air

When it was time to get ready for the news broadcast at the top of the hour, I would put on a record to play while I ran to the teletype machine to tear off a bunch of paper. I would take the strip of paper, with the news stories, into the studio in time to cue up and introduce the next record. Then, when this record was playing, I would edit the news stories into a format suitable for on-air reading.

At the top of the hour, I would give the station callsign, the time-check and start reading the news copy, right off the teletype paper. After the 5-minute news program, I would go back to playing records while I filled out the logsheets. At the end of my program, I would file the logsheet with the teletype paper stapled to the back. In this way, the station manager could report to the FCC as to what commercials were run during the program, what records were played, and what news stories were read during the news spot. The logsheet would indicate the start and stop times for each entry.

Later, I moved on to a local TV station where I did a kid's program. This was back during the time when the host of the show also did the commercials. Since I was on-air talent, I did very little work in station operations. The men who worked in the control room filled out the FCC logs and handled the cuing of the TV cameras. There was also a professional news staff to edit the teletype copy and type it as a finished script. Also, the station had a camera crew and "roving reporter" to cover news stories that could not done in the studio. I had editorial control over the commercials, since I would refuse to read a commercial that I did not feel fit my character or was for a product that should not be sold to kids.

I feel new legislation is needed to bring back the "fairness doctrine", and to repeal the SYNDEX (Syndicated Exclusivity) Rule. I feel in recent years, the FCC has acted in a manner to favor the broadcast and cable-TV industry, and the public interest can go to hell.

When the Fairness Doctrine was abandoned, it created a "closed shop" approach in most radio and TV stations where viewer comments and suggestions are not considered in making decisions at to what goes out over the air. The "bean-counters" have taken over the broadcast industry, and if a news story costs the station or network too much money, it does not get on the air.

Since most radio and TV stations no longer have to consider opposing points of view, the station owners and managers can tell only one side of the story, and ignore other material that does not support thier opinions. For example, WUSA-TV, Channel 9 used to carry an editorial-opinion feature right after the noon news show. This opinion segment allowed the editorial manager to express his views on various public issues. He could also make time available for opposing points of view or replies to his editorial comments.

The repeal of the Fairness Doctrine gave the Editorial Manager too much power. He now can require that people who wish to reply to his commonents to submit a written request for air time and a written summary of remarks to be broadcast. The Editorial Manager then makes the decision as to whether or not to call the viewer so they can come to the station and tape the editorial reply. This acts to keep radical and obscene material from being carried, but it also allows the editorial director to ignore many viewers who have an honest difference of opinion. Since there is no requirement to carry opposing points of view, the Editorial Manager can ignore any request for air time.

Also, WUSA-TV has dropped the editorial-opinion feature at the end of the noon news show. This makes more time available for commercials, and for a lead-in to the soap operas.

Since the Fairness Doctrine is no longer in effect, most radio and TV stations have become little more than carriers of press-releases from various government agencies. Also, the news director decides whether a story is important enough to send out a reporter and camera crew. This creates job opportunities for "media consultants", and other people who can put together a press conference. If a group of ordinary citizens decides to hold a meeting to discuss a public issue, this meeting is usually not covered by a TV news crew. The available camera teams and on air reporters are tied up with a press conference arranged by the Society of Orphans from Blatavia, and there is no news crew available to cover the East Podunk Homeowners Association.

This bias in TV news reporting can be observed in any news show put together and broadcast over WUSA-TV, WRC-TV or WJLA TV stations. Since most of the reporters, camera crews, and station managers live in Maryland, they give most of the air time to stories in Montgomery and Prince George's County, and virtually ignore stories coming out of Virginia.

For example, every time the school board meets in Montgomery County, WUSA-TV sends out a camera crew and an on air reporter, and the story is carried on the evening news program. There is very little air time given to school board meetings in Northern Virginia communities. The only time the news director sends out a camera crew and reporter to Virginia is when the story is too big to ignore.

For example, WUSA-TV carried a story on the noon news and on the evening news about a man who went crazy in the Shenandoah National Park. He was upset because his wife filed for divorce, or something. The story got on the air only because the park rangers and several Park Police officers were dispatched to the scene. When the report came over the Park Police radio frequencies, this was picked up by a scanner radio in the WUSA-TV news department. The news director sent ONE camera team and ONE reporter to cover the story. When the news van arrived, the criminal had already been arrested and taken to the mental hospital. The TV reporter then interviewed the park ranger who had been chosen to speak to the press. This news tape was shown on the noon news show and shown again on the 4PM news, 5PM news and 6PM news. It was probably repeated on the 11PM news, but I did not see this program.

There was no attempt to interview the criminal, or to talk with his relatives or friends. Since the only press coverage given to the story was the interview with the park ranger, very few details were released, such as the number of gunshots fired, where they hit, etc. The park ranger could have just as easily placed a phone call to WUSA-TV and read the press release.

Since several camping families and other park users were put in danger from the stand-off, I feel the story should have gotten better press coverage. If the man had stayed in Maryland and taken over Greenbelt Park, there would be several reporters and camera teams assigned to the story.

In the summer months, most of the local TV stations send a reporter out to the ocean resorts to cover traffic conditions, water and air temperatures, local events at the resort, etc. Most of these reporters go to Ocean City or Rehobeth, and there is no attempt to cover the beach scene at Virginia Beach.

If an ordinary citizen goes to one of the local TV stations with a news tip, they cannot get past the security guard in the front lobby, unless they have a videotape of the story. Simple courtesy would indicate that the citizen be allowed to sign in and go to the news department. If required, one of the reporters can be sent out to escort the visitor. Then, the reporter can sit down with the citizen and conduct a preliminary interview. If the reporter then feels the story is newsworthy, the reporter can write up the story for the news show, or make arrangements for the citizen to be interviewd on the air.

Also, if the reporter feels the story is not important enough for air time, he can thank the visitor and escort the citizen to the front lobby. The value of a news story is a matter that should not be decided by the guard in the lobby.

For example, I came into possession of information regarding an organized conspiracy to steal government office supplies and sell them through a local business firm. I took this story to WRC-TV, and talked to Jim Vance, in the news department. He took my story and confirmed the information through his other sources. He then prepared the first news stories on what became the big GSA Scandal.

Today, if I came to WRC-TV with a similar news tip, I would not get past the guard in the front lobby, unless I had a videotape showing the federal workers stealing government materials.

As for the SYNDEX Rule, this should be repealed, since it gives WUSA-TV, WRC-TV and WJLA-TV a monopoly power they should not have. This also allows WWOR-TV to carry two sets of TV programs. One program schedule is put on the air for showing in the New York/New Jersey area, and a completely different set of programs is fed into the cable-TV systems.

Most of Manassas and Prince William County lies in a "deep fringe" area where on-air broadcast signals are of very poor quality. The distance from the transmitter towers, the large number of interference sources, etc. make it very difficult for me and my neighbors to get good TV reception without a satellite dish or an expensive outdoor antenna system.

Most of the Baltimore stations are simply out of range, since TV signals cannot bend around the curve of the Earth. Most of the Baltimore stations are beyond the horizon, so unavailable to myself and my neighbors. Even if we can pick up one of the Baltimore stations, the broadcast signal quality is so poor, that it is not worth watching.

This was changed when my neighborhood, and most of Prince William County was wired for cable_TV service. Basically, the cable system offered first-class reception quality, and more program choices. The cable operator allocated channel space for all the Washington DC stations and for four Baltimore stations. In addition, you have the cable-only services such as CNN, C-SPAN, HOME SHOPPING CLUB, DISCOVERY CHANNEL, etc.

This system allowed for two stations to carry each network feed. For example, WRC-TV carries programs on the NBC network, and WMAR-TV also carries the NBC network feed. There is a similar paring for WJLA-TV and WJZ-TV (ABC network) and for WUSA-TV and WBAL-TV (CBS network).

This means that if WJLA-TV decides to drop the ABC programs to show a local program, I can tune to WJZ-TV to watch the network show. I and my neighbors had a choice, except when the network cancelled a regular program and put on another show.

For example, the ABC network brought back the MISSION: IMPOSSIBLE television series. Since most of the actors from the original show were not available, Peter Graves recreated his role as the Team Leader, and a new group of actors were hired to play the team members. This new show lasted for 2½ seasons before the network cancelled the program.

This show was carried on both WJLA-TV and WJZ-TV, so I could watch the program either on Channel 7 or Channel 13. During the third season, WJLA-TV decided to drop MISSION: IMPOSSIBLE and show NATIONAL GEOGRAPHIC specials and other programs during this time period. However, I could still watch MISSION: IMPOSSIBLE on WJZ-TV (Channel 13).

When the damm SYNDEX rule took effect, this gave the cable-TV operator an excuse to drop off the Baltimore stations and put cable-only channels in thier place. Therefore, I was not able to watch the last few episodes of MISSION: IMPOSSIBLE before ABC decided to pull the plug on the show.

I have seen re-run episodes of MISSION: IMPOSSIBLE when they were shown on the CBS late-night schedule. However, WUSA-TV has decided to cancel the CBS late-night programs and show DIVORCE COURT during this time period. Therefore, I was not able to see the third-season shows of MISSION: IMPOSSIBLE.

In effect, if WRC-TV, WJLA-TV or WUSA-TV decides to drop the network show and put on another program, there is not a damm thing the viewer can do about it. It is useless to try to call the station, since the telephone switchboard is turned off during the evening and night hours. Writing a letter to the station manager is a waste of time, paper and postage stamps, since the letter usually winds up in the paper shredder.

The early history of radio and TV programming was dominated by a monopoly power exercised by the programming executives at NBC, CBS, and ABC. In effect you had a few men in New York that controlled all the network radio and TV programs in the USA. The local stations were free to put on small-scale programs to local audiences, such as my kiddie TV program.

If one of the Big-3 networks decided to cancel a show, the viewers had no option to reverse this decision. There are only a handful of shows that were put back on the air because the fans of the show wrote the network.

When the FCC allowed the establishment of WTTG-TV, WDCA-TV and other non-network stations, this created the first serious challenge to the monopoly of the Big-3 TV networks. If a viewer did not want to watch the network show, they could tune to one of the local stations and watch an old movie or other program.

For example, when NBC decided to cancel STAR TREK after the third season, there was a flood of letters from fans of the show, but NBC ignored these protest letters, since the NBC executives were too dumb to understand many of the finer points that were brought out in the show. They saw it as an expensive creation with special sets and a lot of costly special effects work.

When WTTG-TV and WDCA-TV began showing re-runs of the STAR TREK episodes, a new group of fans was created. Many people who were too busy to see STAR TREK on the network have seen the re-run episodes. In point of fact, many fans of the show were not even born when the show was on the network.

The original model of the ENTERPRISE hangs in the Air & Space Museum, so a new model was built for the STAR TREK films and for STAR TREK-THE NEXT GENERATION. The design of the starship has influenced the design of the US Space Shuttle and other designs, such as the US Space Station, Moon Colony, etc. It is no accident that the first mock-up of the Space Shuttle was named ENTERPRISE, after the starship in the TV series.

The World-Premier of the first STAR TREK movie was held at the Kennedy Center, and most of the members of the US Congress, Diplomatic Community, and other government officials attended the showing. Since then, there have been five STAR TREK movies, and STAR TREK VI is being filmed. Paramount has the option of filming 10 STAR TREK movies, if they wish.

STAR TREK-THE NEXT GENERATION was concieved and produced for sale to WDCA-TV and other independent stations, and no attempt was made to sell the show to ABC, NBC or CBS. Since this show uses a redesigned starship and a new cast, it will run for many seasons. In effect, the ENTERPRISE is now on a 50-year mission, so the story could continue for a half-century or more. The executives at NBC have had many opportunities to eat crow, since they made a major mistake in taking STAR TREK off the network.

When Ted Turner converted WTBS-TV from a local station into the Super-Station and spun off THE WEATHER CHANNEL, CNN, TNT, and other services to seperate cable channels, he created an empire that poses a serious challenge to the programming executives at NBC, CBS and ABC. The Big-3 networks no longer can count on a captive audince, so they must now work for thier big bucks.

Now that most of the nation has been wired for cable-TV services, the viewers, including myself and my neighbors, have a real choice of which TV programs to watch. Also the use of home VCR equipment has opened up new areas of competetion for the Big-3 network executives. If there is nothing worth watching on the broadcast or cable channels, many viewers can rent a movie from the local video store, or plug in the TV-game unit. There are seperate libraries of old movies and TV game formats.

It would not suprise me one bit if ABC or CBS decided to declare bankruptcy and cease operations. With few exceptions, most of the network programs on the air are a pile of shit.

Instead of responding to the competetion from the cable-TV services, home VCR equipment, and video games, the Big-3 networks are trying to use the FCC as a shield for thier incompetence. Instead of putting on better quality programs to attract viewers, the Big-3 networks try to protect thier monopoly position by persuading the FCC and members of Congress to pass rules that hurt the cable TV industry and help the Big-3 networks.

I have no financial interest in the cable-TV industry. I and my neighbors are simply ordinary consumers who are aware that most of the high quality programs have moved to cable-TV services. For example, when the CHALLENGER Space Shuttle exploded shortly after launching, CBS, NBC and ABC did not even send a camera crew to cover the event. CNN had the only live shots of the launch and explosion, so they were able to stay with the story and carry live reports from the scene.

CBS, NBC and ABC were caught with thier pants down, so they simply bought the rights to show the videotape and broadcast the explosion over and over, until the news anchors could put on thier make-up and go before the cameras. Meanwhile, the bookers on the news shows were trying to line up interviews with Senator Garn, with a couple of retired astronauts, and anybody else they could find from NASA.

I can cite many other examples where NBC, CBS and ABC have dropped the ball on news stories from the earthquake in California to the volcano eruptions in Japan. The "beancounters" have decided it is too expensive to send a news team to Japan or to the Phillipines, so most of the live shots from the area are carried on CNN, or videotape from one of the dependents evacuated from the Subic Bay naval base.

Even the Victory Parade that was held in Washington DC was not covered, except in brief reports on NBC, CBS and ABC. The C-SPAN service had the only full-length parade coverage, from the attaching of the Combat Ribbons to the service flags to the last unit in the parade. CNN tried to cover the parade, but they kept breaking away for commercials and for other news stories.

As for entertainment programming, the big-3 networks have only a handful of programs that are worth watching. Now that MURDER SHE WROTE is showing reruns from the final season, CBS has tried to fill the hole in thier Sunday Night schedule with a show in which a couple of characters pray a lot. Other than that, SUNDAY DINNER offers nothing new.

CBS is aware that the new program cannot stand alone, so they have placed it between reruns of 60 MINUTES and ALL IN THE FAMILY. The theory is that the viewers who watch 60 MINUTES will stay on to watch Archie Bunker and his family. In the fall, when SUNDAY DINNER has a large and loyal audience, the reruns of ALL IN THE FAMILY will be replaced with another new show.

This is a deliberate and cynical attempt to manipulate the rating numbers and to recruit viewers for SUNDAY DINNER. This is not working in my case, since I usually watch 60 MINUTES and watch other programs in the 8-9PM Sunday timeslot. Then I turn back to CBS to see the rerun of MURDER SHE WROTE.

Since I can watch re-runs of MURDER SHE WROTE on the USA cable network, I have seen most of the episodes, either during the original run on CBS or as rerun episodes on cable. Now that the USA Network has started making original movies, sometimes the cable programs are better than the network offerings.

For example, COUNTERSTRIKE (USA network) compares favorably with MISSION: IMPOSSIBLE. In this case, you have a rich man who runs the operation, and the Team Members are retired cops, or a retired criminal who can do things that ordinary police officers cannot do. The new program copies a lot of story ideas from MISSION: IMPOSSIBLE, but gives them a new twist to make them relavant to modern-day situations.

The SYNDEX Rule and other new legislation passed in the past couple of years seems designed to hurt the cable-TV operators and give an unfair advantage to the broadcast stations and Big-3 networks. It is time for me and the other TV viewers to speak out and restore the balance of power.

I am available to testify before your Subcommittee in future hearings of this type. I feel that you need input and information from my end of the cable wire, since I and my neighbors watch the broadcast and cable-TV programs, and we make buying decisions based on products we see advertised. Therefore, we provide most of the money that is used to buy the program talent and to pay the astronomical salaries for the news anchors.

I can be reached by telephone at (703) 791-6598. If I am not at home, my telephone recorder will take the message. The caller can leave thier name, phone number and a brief message. For example, the message might indicate the time and date of the hearing and the room number. If possible, I would like 24 hours advance notice of when I am to testify. This would allow me to arrange for time off from work. Also, I could type up my remarks and make XEROX copies of the material.

Sincerely,

Robert K. Phelps

Robert K. Phelps

Cornell Law School

July 11, 1991

Senator Daniel K. Inouye
Chairman, Subcommittee on Communications
Room 227
Hart Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

Enclosed for inclusion in the record on the June 20, 1991 hearing on the Breaux amendment to S. 12, The Cable Television Consumer Protection Act, is a statement I have prepared. The statement analyzes the constitutionality of Senator Breaux's amendment.

As the statement recites, I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I have written extensively on the first amendment. I am the author of The First Amendment, Democracy, and Romance (Harvard University Press 1991). I also co-author a set of casebooks that together with their yearly supplements are widely used in American law schools. For example, I am the co-author responsible for freedom of speech in Constitutional Law: Case-Comments-Questions (West Publishing Co.)(with William Lockhart, Yale Kamisar, and Jesse Choper) which will appear in its seventh edition later this month. I am also the principal co-author of a newly published casebook, The First Amendment: Cases-Comments-Questions (West Publishing Co. 1991)(with Dean Choper of Berkeley).

My conclusion is that the Breaux amendment is not only constitutionally permitted, but also that under existing law, it would appear to be constitutionally required. The Breaux amendment may be a necessary ingredient if must carry rules are to pass constitutional muster.

Sincerely,

Steven H. Shiffrin

Myron Taylor Hall, Ithaca, New York 14853-4901 ~ Fax: (607) 255-7193

Statement of

Steven H. Shiffrin
Professor of Law
Cornell University

Regarding

Mandatory Carriage of Home Shopping Broadcast Channels

To the

Subcommittee on Communications
Committee on Commerce, Science and Transportation
United States Senate

July 12, 1991

I appreciate the opportunity to submit this statement to the Subcommittee regarding the Breaux amendment to S. 12, the Cable Television Consumer Protection Act.

My name is Steven Shiffrin. I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I have written extensively on the first amendment. I am the author of The First Amendment, Democracy, and Romance (Harvard University Press 1991). I also co-author a set of casebooks that together with their yearly supplements are widely used in American law schools. For example, I am the co-author responsible for freedom of speech in Constitutional Law: Case-Comments-Questions (West Publishing Co.)(with William Lockhart, Yale Kamisar, and Jesse Choper) which will appear in its seventh edition later this month. I am also the principal co-author of a newly published casebook, The First Amendment: Cases-Comments-Questions (West Publishing Co. 1991)(with Dean Choper of Berkeley).

I write with regard to the constitutionality of Senator Breaux's amendment. Subject to exceptions not important here, S. 12 would require cable operators to carry the broadcast signals of television stations local to their communities (the "must carry" rules). A major purpose of S. 12 is to assure that cable operators not exclude local sources of news and diverse programming. If passed, the must carry rules would be premised in large part on the view that the "public's right to receive a diversity of voices is served by ensuring public access to free local broadcast television stations." H.R. Rep. 101-682, 101st Cong., 2d Sess. 62 (1990)(reporting on the Cable Television Protection and Competition Act). In keeping with that premise, Senator Breaux has proposed that cable operators need not be forced to carry the signal of any commercial television station that is involved not in the presentation of news or diverse programming, but rather is "predominantly utilized for the transmission of sales presentations or program-length commercials."

The Breaux amendment is plainly constitutional. Assuming Congress decides to enact must carry rules of the type specified in S. 12, Congress need not mandate access for a shopping channel.

Congress has broad latitude in dealing with commercial speech. In appropriate circumstances such as these, it can discriminate against commercial speech; it can discriminate between types of commercial speech; and it certainly can decide to support local programming without supporting all types of local programming

* particularly when it has not engaged in point of view discrimination

* when it continues to permit cable operators broad discretion to carry home shopping channels

*when it leaves home shopping channels on a level playing field

* and when it has forged a good faith accommodation among the rights of cable operators, speakers, and audiences.

I understand, however, that Home Shopping Network ("HSN") has secured an opinion from its counsel stating that the Breaux amendment is unconstitutional.[1] In support of this contention, HSN's counsel parades a standard set of citations stating that the first amendment or the equality principles of the Constitution[2] are at war with content discrimination. From that premise, it takes a leisurely slide to the conclusion that the Breaux amendment is an impermissible exercise in content discrimination.

I am unpersuaded by the discussion of HSN's counsel. Noticeably absent from its opinion is any analysis[3] of the "commercial speech" cases. Yet, if we are to assume that principles of content discrimination are relevant here,[4] the dispositive doctrinal field relevant to the Breaux amendment is the commercial speech doctrine. Moreover, it speaks plainly in favor of the amendment. Absent discussion of that doctrine, the opinion of HSN's counsel is without foundation.

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[1]. See attachment 10 to the written testimony of Robert T. Sutton, President, Home Shopping Network, Inc., Before the Senate Communications Subcommittee, Committee on Commerce, Science and Transportation, United States Senate, June 20, 1991 (the opinion of Dow, Lohnes & Anderson).

[2]. In this context, the first amendment and the equality principles contained in the due process clause of the fifth amendment run together. Compare Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972) with Consolidated Edison Co. v. Public Service Comm'n., 447 U.S 530 (1980)(locating an equality principle in the first amendment and citing Mosley as a first amendment case) and Minnesota State Board v. Knight, 465 U.S. 271 (1984)(using equal protection as the analytic framework and citing Mosley as an equal protection case). In this context, the constitutional principles are more important than the constitutional pegs, so I use the first amendment and free speech equality principles interchangeably in this memorandum.

[3]. In fact, the doctrine is not even mentioned. None of the cases cited by HSN's counsel concerning content discrimination involve commercial speech.

[4]. But see text accompanying note 10 and note 10 infra.

For most of the history of this republic, commercial speech has received no protection whatsoever. Today it occupies a subordinate position in the hierarchy of first amendment values. Shopping channels can cannot claim that the Breaux amendment violates constitutional equality principles because the Constitution has long been interpreted to recognize that speech proposing a commercial transaction is *not* equal.

DISCUSSION

For constitutional purposes, commercial speech is that speech which "propose[s] a commercial transaction." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). *Accord* *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986). Since the Breaux amendment focuses upon channels that are "predominantly utilized for the transmission of sales presentations or program-length commercials," the amendment has plainly targeted commercial speech.

Commercial speech does not receive full first amendment protection. As the Court stated in *Board of Trustees v. Fox*:

> "*Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of first amendment values,' and is subject to 'modes of regulation*

that might be impermissible in the realm of noncommercial expression.'[5]

Thus, even though content regulation of non-commercial speech for the most part is permitted only under extraordinary circumstances, the standards involving commercial speech are far more relaxed.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) is an important case in point. San Diego enacted an ordinance that imposed substantial restrictions on the display of outdoor advertising signs. The ordinance permitted onsite commercial signs, but with few exceptions prohibited noncommercial signs and offsite commercial signs.[6] The Court held that San Diego could ban commercial billboards without banning non-commercial billboards and that it could ban off-site commercial billboards without banning on-site commercial billboards. Thus government could favor noncommercial speech over commercial speech and some forms of commercial speech over others.[7]

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[5]. 492 U.S. at 477 (emphasis added), quoting Ohralik v. Ohio Bar Ass'n., 436 U.S. 447, 456 (1978).

[6]. Thus a market could advertise itself and its products on the property where the market stood, but not off the site of the market, e.g., down the block.

[7]. San Diego was not similarly free to favor commercial speech over noncommercial speech. White, J., joined by Stewart, Marshall, and Powell, JJ., found the ordinance defective first, because it discriminated against noncommercial speech (permitting commercial signs on business sites while prohibiting non-commercial signs) and second, because it discriminated between types of noncommercial speech (making exceptions for signs involving governmental functions, time/weather/news public service signs, and temporary political campaign signs). Brennan and Blackmun, JJ., concurred on different grounds.

The Court made it clear, however, that if the statute's severability provision was interpreted to prohibit offsite

The Court again recognized the lesser degree of protection for commercial speech and observed that so long as substantial interests were furthered in accord with constitutional prerequisites,[8] the ordinance was constitutional. As Justice White explained, that test was easily met:

> "* * * San Diego has obviously chosen to value one kind of commercial speech -- onsite advertising -- more than

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commercial signs while permitting onsite commercial signs and noncommercial signs generally, the first amendment did not stand in the way. See White, J., joined by Stewart, Marshall, Powell, and Stevens, JJ., *id* at 493-512. Stevens, J., joined those aspects of the opinion dealing with commercial speech, but thought White, J., was overly protective of noncommercial speech.

[8]. The language most frequently cited is that appearing in Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980). Government regulation of commercial speech is permitted if the regulation "directly advances" "substantial" governmental interests by "means not more extensive than is necessary to serve" the governmental interest. The latter part of the test has been subject to varying interpretations. Despite several prior decisions stating a view more protective of commercial speech, Board of Trustees v. Fox, *supra*, at 480, concluded that all the holdings of the cases actually required was a reasonable fit between the legislature's ends and the means chosen to accomplish those ends:

> "What our decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,' [citing *Posadas,* 478 U.S. at 341] - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' [citing *In re R.M.J.,* 455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means, but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed."

In other words, the least restrictive means test or a reasonable facsimile is no longer required. Over the years, if anything, the test for the protection of commercial speech has become less demanding than it was at the time of *Metromedia*.

another kind of commercial speech -- offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance -- onsite commercial advertising -- its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise -- as well as the interested public -- has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. *It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising.* Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted."[9]

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[9]. *Id.* at 512 (emphasis added). For cases following *Metromedia, see, eg.,* Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988); Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987); Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986); National Advertising v. Downers Grove, 561 N.E.2d 1300 (Ill.App. 1990). See also Ackerly Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513, 522 n. 16 (1st Cir. 1989)(citing *Naegele, supra* with approval).

Another significant case indicating the low level of protection for commercial speech is *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, supra.* In *Posadas*, a gambling casino in Puerto Rico objected to legislation that

Similarly, it does not follow from the fact that government would require cable operators to carry channels that contain commercial advertising mixed in with regular programming that it must require cable operators to carry home shopping channels predominantly utilized for the transmission of sales presentations or program-length commercials.

Indeed, it is not even clear that the Breaux amendment would have to meet the kind of test applied in Metromedia. Metromedia involved a ban of commercial speech on offsite billboards. The Breaux amendment bans no speech. It merely refuses to give home shopping channels a benefit.[10]

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prohibited gambling casinos from advertising to Puerto Rican residents. Puerto Rico permitted other forms of gambling to its residents including advertising for horse racing, cockfighting, and the lottery. One gets the impression that some lobbies were just stronger than others. Nonetheless, even without legislative findings, the Court upheld the Puerto Rican legislative scheme.

The one circumstance in which commercial speech has been afforded meaningful protection has been when government attempted to suppress a particular truthful message. Most of those cases have involved attorney advertising. For example, in the most recent case, Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990) invalidated a rule prohibiting an attorney from stating on his letterhead that he had been certified by a nationally prominent organization. Even that decision was 5-4 and two of the Justices in the majority (Brennan and Marshall, JJ.) have since resigned from the Court.

[10]. Thus the appropriate analogy might be to Rust v. Sullivan, 59 U.S.L.W. 4451 (U.S. May 23, 1991). The Court there held that government could subsidize the giving of advice about family planning while excluding the use of its benefits for information about abortion. Rust is an enormously controversial decision given that abortion is a fundamental constitutional right, that poor patients are in danger of being deprived of information and perhaps even deceived, and that the state is seen to be intruding on the practice of medicine. One need go nowhere near as far as Rust to

But assuming the Breaux amendment were treated as a regulation of commercial speech, substantial interests would support it. Congress is entitled to the view that the interest in sponsoring local news and diverse programming which it believes outweighs the free speech interests of the cable operators is not of similar weight when a home shopping channel is involved. The Breaux amendment leaves to the cable operator the discretion to determine whether to carry a health channel, CSPAN, CSPAN II, or other diverse fare such as movies, sports, music, or specialized presentations aimed at individual segments of the national audience -- or a home shopping channel. It would be singularly odd if the first amendment were read to _require_ government to discriminate in _favor_ of commercial speech.

Similarly, nothing in the Constitution requires Congress to sponsor one home shopping channel over another. Congress is entitled to leave to the independent judgment of the cable operator to decide which home shopping channel or channels to carry. There is a substantial interest in assuring competition among home shopping channels and not arbitrarily to intervene in favor of one over the other. Whether or not it is constitutionally permitted to

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recognize that government can promote diverse programming without promoting commercial speech. Government can make value choices in defining a curriculum, in selecting books in a library, in establishing the National Endowment for Democracy, and in a multitudinous array of activities. Just as government can refuse to include commercials in public schools, it can refuse to include home shopping channels in must carry legislation. See generally Shiffrin, _Government Speech_, 27 UCLA L. Rev. 565 (1980).

impose a shopping channel on a cable operator, it is not required to do so.

Perhaps even more important, Congress must take into account the cable operator's free speech rights and interests. As the court stated in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C.Cir. 1985), cert. denied, 476 U.S. 1169 (1986) must carry rules impose a significant injury on cable operators, i.e., the rules can impose substantial limitations on the "operator's otherwise broad discretion to select the programming it offers its subscribers." Before Congress seeks to impose a type of channel on a cable operator, it has a substantial interest in assuring that the rights of cable operators are given due weight.

Indeed, the Breaux amendment may be constitutionally required. Although there is constitutional controversy about what first amendment test benefits cable operators, it is clear that impositions upon cable operators have been looked at with substantial care, and must carry provisions have twice been invalidated. See Quincy, supra; Century Communications Corp. v. FCC, 835 F.2d 292 (D.C.Cir. 1987), clarified, 837 F.2d 517 (D.C.Cir. 1988), cert. denied, 108 S.Ct. 2014 (1988). Among other things, Quincy objected to the fact that the must carry rules "indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator." 768 F.2d at 1460. See also Century Communications, 835 F.2d at 295.

As the Seventh Circuit recognized in Chicago Cable Communications v. Cable Comm'n, 879 F.2d 1540, 1550 (1989), the "important qualities embodied in the term 'localism'" include community pride, cultural diversity" and the like. Even if the national feed of a home shopping channel like HSN could plausibly be considered local, commercial speech hardly fits the associations connoted by the term localism. Even if commercial speech fit the conception of localism, Quincy would seem to call for a determination of the extent to which the imposition of more commercial speech through mandatory access for a home shopping channel would be piled on top of already existing local advertising. No court could possibly miss the fact that commercial television channels afford an abundant supply of local commercials. Quincy is currently the law, and so long as Quincy is the law, it seems clear that the Breaux amendment is not only constitutionally permitted; it is likely that it is constitutionally required.[11]

Finally, from a constitutional perspective, it is worth noting that the Breaux amendment does not engage in point of view discrimination. It does not favor one kind of commercial message over another. Commercial advertisers of all stripes have abundant access to commercial television, and home shopping channels are commonly carried by cable television operators.

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[11]. Cable operators, of course, remain free under the Breaux amendment to provide more commercial speech and free to determine which supplier (or suppliers) best serves the interests of consumers, but localism can not be used as a talisman to force access by home shopping channels.

HSN contends, however, that it is being unconstitutionally singled out for special treatment.[12] As the counsel for Home Shopping Network maintains, "[O]nly television stations owned by or affiliated with HSN fall within" the scope of the Breaux amendment. In other words, although HSN is not the only home shopping channel, HSN has a monopoly on the broadcast licenses afforded to home shopping channels. Thus, if the Breaux amendment were not passed with the must carry rules, HSN would enjoy a totally unearned competitive advantage. Counsel for HSN argues that because the effect of the Breaux amendment would fall upon it alone (a result that obtains only because of its monopoly status), a court would rule that Congress had an unconstitutional purpose. Yet the Court has repeatedly ruled that it will not lightly attribute an unconstitutional motive to any level of government, let alone to the Congress of the United States.

The leading case is United States v. O'Brien, 391 U.S. 367 (1968). O'Brien was prosecuted for knowingly destroying his draft card pursuant to a Congressional amendment passed in 1965. The avowed Congressional purpose of the amendment was to assure the smooth functioning of the Selective Service System by protecting the certificates. O'Brien argued that the 1965 amendment was unconstitutional because the real purpose of Congress was to suppress freedom of speech. Not a few observers past and present thought O'Brien was not speaking purely out of his imagination. Draft card burners were not popular in 1965. Nonetheless, the Court stiffly rejected O'Brien's argument:

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[12]. Of course, the Breaux amendment singles out commercial speech for special treatment, but, as we have seen, that is not a constitutional sin. Any other rule would lead to quite serious results. For example, 47 U.S.C. § 399b provides that "No public broadcasting station may make its facilities available to any person for advertising of any advertisement." The purpose of § 399b is to assure that the American public has access to programming that is relatively uninfluenced by commercial advertisers. If noncommercial speech could not be favored over commercial speech, we would have no public broadcasting system.

> "[U]nder settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional. It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[13]

O'Brien did note that there are occasions when the very substance of the constitutional inquiry involves punitive motivation. Specifically, a bill of attainder is a legislative act "which inflicts punishment on an easily ascertainable individual without a judicial trial." Id. at 383 n. 30. The difficulty with the argument put forward by HSN is that so far as I am aware there is nothing in the legislative history to indicate that anyone is trying to punish HSN. Of course, there is the view that home shopping channels do not deserve Congressionally mandated access into people's homes. But I would be surprised if there is anything in the legislative history to support the view that Congress would have a different view if _someone else_ owned or were affiliated with those who own the shopping broadcast channels.

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[13]. Id. at 383. See also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)(following O'Brien).

News America Publishing v. FCC, 844 F.2d 800 (D.C.Cir. 1988) illustrates the point. There Congress passed an amendment to legislation involving cross ownership rules that struck at Rupert Murdoch "with the precision of a laser beam." _Id._ at 814. The amendment in question forbade "waiver extensions _only_ to News America [controlled by Rupert Murdoch], not to any other party that might receive a temporary waiver and seek an extension during the fiscal year." _Id._ Indeed, the court pointed out that if New America sold its Boston station to the _Boston Globe_, the _Globe_ could immediately seek a temporary waiver and extension. Moreover, the amendment was passed after mentioning Murdoch by name in a series of derogatory discussions. In short, the gun was smoking in _News America._

By contrast, the Breaux amendment applies whoever owns a home shopping broadcast channel; the legislative history bears no evidence of punitive intent (so far as I am aware); and, far from being punished, HSN is left on a level playing field, able to contend for access on the merits.

CONCLUSION

Commercial speech has always been a stepchild in the first amendment family. Indeed, for most of our history, speech proposing a commercial transaction has been afforded _no_ first amendment protection; it has never received generous first amendment protection. The Breaux amendment denies privileged access to home shopping channels. This is in keeping with our constitutional traditions.

Indeed, the Breaux amendment strengthens the constitutional case for must carry legislation. It shows that Congress has appropriately considered the rights and interests of cable operators without blindly pursuing a distorted conception of localism. It shows Congressional sensitivity to long recognized constitutional values. In short, the Breaux amendment is clearly not unconstitutional; it is likely to be understood as an exercise in constitutional responsibility.

National Association of
NAB
BROADCASTERS

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July 3, 1991

The Honorable Daniel Inouye
Chairman
Subcommittee on Communications
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter is to provide NAB's response to the United Church of Christ's report on television informational programming for the record of the Communications Subcommittee hearing on broadcasters' public interest responsibilities.

As I noted in my testimony on June 20th, NAB had only received a copy of this report the night before the hearing. I remarked then that after only a cursory review of the report, NAB's Research and Planning Department had already found some glaring problems with the study. In this letter I will review these and additional problems we have found with the approach and methodology of the report. I believe that these problems show this study to be unreliable.

Let me begin by saying that the premise that you simply can count up the minutes of informational programming and make a policy decision on whether enough programming is provided is ludicrous. Clearly these quantitative measures say nothing about the quality of the programming. Moreover, counting minutes of certain types of informational programming does not acknowledge the changing nature of how broadcasters are providing that information to the American public. Broadcasters are increasingly covering important policy and social issues not by having talk shows at inconvenient times of the day, but rather by including segments on these issues in their local news. In fact, the UCC study found that local news *increased* since the year in which deregulation took effect. This result is not surprising, as the Essential Information study cited by UCC also found an increase in the amount of local news (a 74% increase from 1979 to 1989). This flexibility in covering the important issues of the day is exactly what the FCC sought when deregulating stations from arbitrary quantitative limits.

Still another example of stations covering local issues, not documented by the UCC study, is the one-minute newsbreaks stations air throughout the day. This has been increasingly used by stations in recent years. For example, one station in Washington, D.C. has committed to airing them every hour. The time allocated for newsbreaks is not included in the television guides used by the UCC and was not independently sought by the authors of the study. As a result, the increase in local news reported by the UCC study would be even more dramatic.

Before I go any further discussing some of the study's results, I would like to point out that the UCC reliance on their survey results to justify policy changes would not hold up to any scientific review. While the authors of the study do a professional job in randomly selecting the markets and stations to study, they fail to carry that professionalism through when discussing the significance of their results. As any first year statistical student knows, one must always discuss the *margin of error* associated with results when evaluating results from a random sample. Only then can you confidently determine whether there was any significant change. Nowhere in the study is there any mention of the margin of error for the results presented.

We believe there is an obvious reason for this omission, as it would show that there has been no change in the amount of informational programming. The small decreases in certain types of informational programming, relied upon by the authors to make their broad policy recommendations, would be shown to be within that margin of error. In other words, the changes which form the foundation of sweeping reregulation proposals are just as likely to be caused by sampling error as by alterations in the practices of television broadcasters. Needless to say, NAB submits that adopting policy prescriptions on such evidence is not the best way to set communications policy.

Another problem with the study and the approach it takes is that it neglects the increase in the number of stations on air informing the public. Instead, it focuses on the amount of informational programming offered by the average station. Yet, with the 55.3% increase in the number of television stations on air since 1974 (the first year analyzed), the 45.9% increase since 1979 (the second year) and the 23.8% increase since 1984 (the third year), there is a tremendous increase in the *total* amount of informational programming available to the American public covering a wide range of issues. That should be the primary focus of Congress, what the American public can see and hear via free over-the-air broadcasting.

In addition to relying on these results, the authors also discuss other "research" included in two petitions-to-deny in which they were a party. In both of the cases mentioned the petitions-to-deny were denied by the FCC with the finding that the amount of programming was adequate. With the lack of results included in the present UCC study and the FCC discounting earlier studies of specific cases, one might ask "where's the beef?"

On the other hand, we believe that the broadcasting industry is fulfilling its responsibilities in informing the public on important social and policy issues and we have reliable evidence to prove it. In a recent survey of the U.S. public, the well-known Roper Organization found that 81% said they get most of their news from television. Even before the Gulf War started that percentage was at its all time high of 69%. Furthermore, 58% of the public said that television was the most believable source of news, nearly triple the level of its nearest competitor, newspapers.

Still more evidence, already submitted to the Subcommittee, shows broadcasters fulfilling their responsibilities through their public service activities. In a survey of radio and television stations, reported in "In the Public Interest: A Survey of Broadcasters' Public service Activities," NAB provided evidence on the level of activity in this area. For example, over 90% of radio and television stations reported that they aired public service announcements before election day to encourage people to vote. Counting all their PSAs, the average radio station donated $128,319 worth of free air time in 1990, and the average television station donated $262,501 worth. Interestingly, the UCC study does *not* include any acknowledgement of this time provided by broadcasters in the two later years of the study. Yet, it was counted for the first two years, prior to deregulation.

In conclusion, we are proud of the broadcasting's industry commitment to serving the American public. We take seriously any criticism of that service and carefully examine any "proof" that shows otherwise. Such is the case with the UCC study. Upon examination of this evidence, NAB sees serious methodological and reporting flaws that make this study unreliable.

Sincerely,

Eddie Fritts

SUMMARY

The Senate is currently considering inclusion of "must-carry" provisions in S. 12, the Cable Television Consumer Protection Act reported out by the Senate Committee on Commerce, Science and Transportation on May 14, 1991. Under must-carry, cable systems would be required to carry as part of their program offerings the broadcast signals of the television stations within the local viewing areas of their communities. The Senate is also considering a proposed amendment to S. 12 offered by Senator Breaux that would exclude from the general must-carry requirements commercial television stations that are predominantly used for "sales presentations or program-length commercials."

The must-carry provisions under consideration raise several significant constitutional questions:

1. There Is a Significant Issue Concerning the Constitutionality of Any Must-Carry Provisions.

-- Two sets of must-carry rules adopted by the FCC have already been rejected by the Courts under the First Amendment.

-- The only must-carry provisions that could withstand constitutional scrutiny would have to be precisely drawn so as to be necessary to further the government interests that supposedly support the must-carry concept: the fostering of the local system of broadcasting, diversity of programming, and competition among programmers.

2. Provisions That Would Require Home-Shopping and Other Direct-Marketing Format Stations To Be Carried on the Basic Tier Would Be Unconstitutional.

-- Requiring cable systems to carry home-shopping and other direct-marketing format stations would not enhance localism, program diversity, or competition (the apparent government interests supporting must-carry), and would therefore violate the First Amendment.

-- Provisions granting must-carry status to home-shopping and other direct-marketing stations would provide an irrational and unfair preference to one competitor in the marketplace and would encourage the conversion of television stations to home-shopping and direct-marketing formats. Because neither result forwards the supposed purposes of must-carry, these provisions would be unconstitutional.

3. An Amendment Excepting Home-Shopping and Direct-Marketing Stations from the General Must-Carry Provisions of S. 12 Would Alleviate the First Amendment Concerns That Would Result from Granting These Stations Must-Carry Status.

-- The amendment proposed by Senator Breaux would apply to all home-shopping and direct-marketing stations and allow cable operators to decide for themselves whether to carry such stations.

-- In fine-tuning S. 12 to bring it into greater congruence with its apparent purposes, the amendment would enhance the possibility that must-carry will pass constitutional muster and would not itself be constitutionally infirm.

DISCUSSION

1. In Order To Survive Challenge Under the First Amendment, Any Must-Carry Provisions Adopted by Congress Must Be Precisely Drawn To Further a Substantial Governmental Interest with the Narrowest Necessary Effect on Speech.

Any must-carry provisions that are included in a cable bill will be subject to challenge under the First Amendment. The Courts have already struck down two sets of must-carry rules adopted by the FCC.[1] It is clear from these and other applicable decisions that to be sustained under the First Amendment, any new must-carry provisions will have to be drafted with great precision.

In its Quincy decision rejecting the FCC's first version of must-carry rules, the Court of Appeals for the District of Columbia Circuit held that such rules cannot pass constitutional muster unless they "further an important or substantial governmental interest [and] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[2] The Court then determined that the FCC had failed to demonstrate either that the rules furthered a substantial governmental interest or that they were drafted as narrowly as possible to accomplish that interest.

The basis for the must-carry rules articulated by the FCC in Quincy was the supposed threat to the system of local broadcasting presented by the potential exclusion of local stations from cable coverage. The Court concluded that the FCC had failed to prove that this was a "real" as opposed to "merely a fanciful threat."[3] The Court held that the FCC had not adequately demonstrated "that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat."[4]

The Court then concluded that in any event, the FCC's initial must-carry rules were broader than necessary to fulfill its expressed purpose of protecting "localism."[5] The Court first noted that "the rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator."[6] The Court also pointed out that the rules protect "every broadcaster, regardless of whether or to what degree" the broadcaster in fact is threatened by the operation of a cable system.[7] As a result, the Court found the rules to constitute an impermissible "blunderbuss approach."[8]

In its Century Communications decision, the Court likewise struck down the FCC's second version of must-carry rules, because the FCC again had failed to demonstrate the necessary "substantiality of the governmental interest" and to adopt rules that were sufficiently narrow in operation to provide the requisite "congruence between means and ends."[9]

The legal standards set forth in Quincy and Century Communications will also apply to any must-carry provisions of a cable bill that ultimately is passed. In short, the constitutionality of the must-carry provisions will turn on (1) whether there is a substantial governmental interest that supports the provisions and (2) whether the provisions are narrowly drawn so that their terms are essential to further that interest.

Presumably, the governmental interest offered in support of the must-carry provisions of S. 12 would be the protection of the system of local broadcasting, coupled with related concerns for public access to diverse programs and competition among programmers.[10] It remains unclear whether the Courts would find that there is sufficient basis for these supposed interests to uphold any must-carry provisions in a cable bill. What is clear, however, is that the provisions of S. 12 without the so-called Breaux Amendment would not be upheld because they would not forward the supposed governmental interests that support must-carry and because they would be overly broad in providing unnecessary must-carry status favoring one communications company over non-broadcast competitors providing the same type of programming.

2. Provisions That Would Require Cable Systems To Carry Home-Shopping and Other Direct-Marketing Format Stations on the Basic Tier Would Not Advance the Supposed Goals of Must-Carry and Would Be Unconstitutional.

The "basic tier" of a cable system is made up of those services that a subscriber receives for the minimum cost of signing up for cable. The must-carry provisions proposed in S. 12 would require cable systems in general to devote one-third of their channel capacity to carriage of local commercial television stations on the basic tier. Although certain aspects of these provisions may be constitutionally valid, others would violate the First Amendment.

For example, the provisions of S. 12 would guarantee the inclusion in the basic tier of local affiliates of commercial broadcast networks and of local independent commercial television stations. These provisions might be found to be constitutional, since they appear to be generally consistent with the supposed purposes of must-carry to foster local broadcasting and diversity and competition in programming.

However, to the extent that S. 12 would guarantee basic-tier carriage of local broadcast outlets used by a home-shopping company, or devoted to a direct-marketing format such as "infomercials" (one-half or hour-long marketing endeavors), the bill would be unconstitutional. Like the music video broadcasters discussed in Quincy, these types of programming are "devoid of any local orientation at all."[11] Just as stations devoted to such programming are not fostering localism, they also are not increasing program diversity or enhancing competition among program suppliers. Therefore, mandated cable carriage of home-shopping or direct-marketing stations would do nothing to further the apparent governmental interests underlying must-carry.

Indeed, to the extent that S. 12 would require cable systems to carry national home-shopping or other direct-marketing format stations on the basic tier, the bill would serve no purpose other than to give these stations favored treatment against their non-broadcast competitors. This preferential effect would not be consistent with an attempt to foster local broadcasting or program diversity and would in fact be inconsistent with the goal of promoting competition in the marketplace. In our judgment, the bill would therefore be invalidated by the Courts as lacking the "congruence between means and ends" required under the First Amendment.

As Senator Breaux noted in proposing an amendment to S. 12, a particular home-shopping company -- Home Shopping Network, Inc. ("HSN") -- uses UHF stations as well as satellite feed to place its programs on cable systems. These UHF stations devote their broadcast time almost exclusively to the retransmission of satellite-delivered national sales presentations which are also available on many cable systems through HSN's cable network. Granting must-carry status to these stations would in no way further the governmental interests in localism and diversity on which must-carry is supposedly based but would merely provide preferential treatment to HSN vis-a-vis other home-shopping companies such as QVC Network, Inc. that have confined their programming to cable.

In addition, others may try to convert stations into conduits for home-shopping and other direct-marketing formats such as one-half and full-hour "infomercials" in order to qualify for must-carry status under S. 12. Again, encouraging such conversion of stations to home-shopping or direct-marketing purposes would not serve the goals that must-carry is designed to fulfill and would have the result of favoring one competitor over another based only on its use of broadcast facilities.

The fact is that there is no reason why home-shopping company or other direct-marketing format stations should receive must-carry status of any kind:

-- Home-shopping and direct-marketing stations by definition do not enhance the local system of broadcasting, because they are used almost exclusively for the remote broadcasting of nationally-transmitted sales presentations.

-- Home-shopping and direct-marketing stations by definition do not enhance program diversity because they present almost no diverse or local programming.

-- Favored treatment for home-shopping and direct-marketing format stations over competing cable programming services by its very nature would be anti-competitive.

As a result, a bill that included must-carry status for home-shopping or other direct-marketing formats merely because they were carried on broadcast stations would be the type of must-carry regulation that has been invalidated in the past as "'grossly' over-inclusive [because] the rules indiscriminately protect each and every broadcaster"[12] without regard to whether the supposed purposes of must-carry are furthered.

3. Rather Than Raising New Constitutional Issues, the Amendment Proposed by Senator Breaux Would Help To Ameliorate Some of the Concerns Created by the General Must-Carry Provisions of S. 12.

In proposing an amendment to S. 12, Senator Breaux specifically recognized the significant First Amendment questions raised by legislation that would force cable systems to carry home-shopping stations on their basic tier despite the non-local and duplicative nature of the programming offered by those stations.[13] Senator Breaux further noted that mandating cable carriage of home-shopping stations would confer an unfair advantage on one home-shopping company utilizing both broadcast and cable distribution systems over competing home-shopping networks available only on cable, and over other special-interest cable networks as well, since these other networks would inevitably be forced off many cable systems due to inadequate channel capacity.[14]

Senator Breaux has proposed to avoid these unfortunate and legally suspect effects of S. 12 with an amendment that would remove from must-carry status any commercial television station "predominantly utilized for the transmission of sales presentations or program-length commercials." By attempting to make S. 12 more congruent with its supposed goals of increasing localism and program diversity and competition, the amendment would increase the likelihood that the legislation will pass constitutional muster. Thus, the amendment is a positive development from a First Amendment point of view.

It comes as no surprise that the only home-shopping company that currently uses both UHF stations and cable feeds to distribute its programming is unhappy at the prospect of losing its preferential position under S. 12 and therefore seeks to defeat the amendment proposed by Senator Breaux. In an attempt to preserve the unfair advantage that it would receive under S. 12, this company has launched a baseless attack on the amendment on First Amendment grounds and as a denial of equal protection.

The arguments advanced against the amendment turn the constitution on its head. As we have already shown, without the amendment S. 12 itself would be highly unlikely to survive a challenge under the First Amendment, because it would extend must-carry protection to stations that do not promote the goals of must-carry and because it would grant one home-shopping company favored treatment over its competitors.

The defect in the attack on the amendment is its failure to recognize that the burden on free speech at issue here is created by S. 12 and not by the amendment. S. 12 would require cable operators to carry the signals of local commercial television stations. In contrast, the amendment merely would except certain types of stations from this requirement and permit cable operators to carry or not to carry the signals of those stations as they wish. Moreover, the exception of these stations from the general must-carry requirements would be based on the fact that the programming offered by these stations does not forward the purported goals of must-carry. For all these reasons, the amendment would further constitutional goals and clearly would not create any new constitutional concerns.

One home-shopping company has complained that the amendment is designed to discriminate against its stations alone based only on the content of their speech. While Senator Breaux has identified combined use of UHF and cable affiliates by one home-shopping company as a reason for the amendment to S. 12, he has not confined his concerns to that company's activities. Rather, Senator Breaux also has noted that "several 'infomercial' [program-length commercial] producers are now trying to recruit other UHF stations to similarly convert their programming schedules into strings of virtually non-stop commercials."[13] The amendment is broadly drafted to cover any home-shopping or direct-marketing station that seeks to use must-carry to avoid competition and guarantee cable carriage of its non-local broadcasts. Moreover, the amendment would not restrict or forbid carriage of such stations by cable operators; instead, the amendment merely would exclude those stations from the general must-carry provisions of S. 12. For both these reasons the amendment is quite different from the statute involved in the News America case, which by design restricted the speech of a single company.[14]

The fact that the amendment would except certain stations from the general must-carry provisions of S. 12 based on the nature of the programming of those stations does not create a constitutional problem because it is the nature of those stations' programming that does not warrant their being given must-carry status in the first place. Under these circumstances, the Mosley case, which prohibits governmental distinctions between speakers based on the content of their speech,[17] is inapposite. In any event, unlike the situation in Mosley, where by ordinance only labor picketing was permitted near a public school, under the amendment cable operators would "still [be] free to choose" to carry a home-shopping or direct-marketing station over a competing home-shopping, direct-marketing, or other cable network.[18] The amendment thus would do no more than refuse to extend the automatic protection of must-carry beyond what is needed to achieve its stated goals.

The amendment proposed by Senator Breaux is a modest, narrowly-drawn effort to remedy one of the First Amendment concerns clearly presented by the general must-carry provisions of S. 12. As such, it should be endorsed by Congress and not itself subjected to baseless constitutional attacks.

FOOTNOTES

1. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

2. *Quincy*, *supra*, 768 F.2d at 1450-51, *quoting* *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

3. *Quincy*, *supra*, 768 F.2d at 1454 and 1457, *quoting* *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

4. *Quincy*, *supra*, 768 F.2d at 1459.

5. *Id*. at 1459-62.

6. *Id*. at 1460.

7. *Id*. at 1461.

8. *Id*. at 1462.

9. *Century*, *supra*, 835 F.2d at 300-04.

10. *See* Report on S. 1880 of Senate Committee on Commerce, Science and Transportation, at 50.

11. *Quincy*, *supra*, 768 F.2d at 1460 n.52.

12. *Id*. at 1460.

13. Explanation of Amendment proposed by Senator Breaux, dated 6/14/91.

14. Id.

15. Id.

16. See News America Publishing, Inc. v. FCC, 844 F.2d 800, 814-15 (D.C. Cir. 1988).

17. See Police Department v. Mosley, 408 U.S. 92, 96 (1972).

18. See National Association of Independent Television Producers & Distributors v. FCC, 516 F.2d 526, 537 (2d Cir. 1975).

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